NEW YORK STATE BAR ASSOCIATION

JOURNAL

Dismantling Walls

To Encourage Diversity in the Legal Profession

By David R. Marshall

NYSBA

MARCH/APRIL 2022
VOL. 94 | NO. 2

LawPay®

AN AFFINIPAY SOLUTION

+

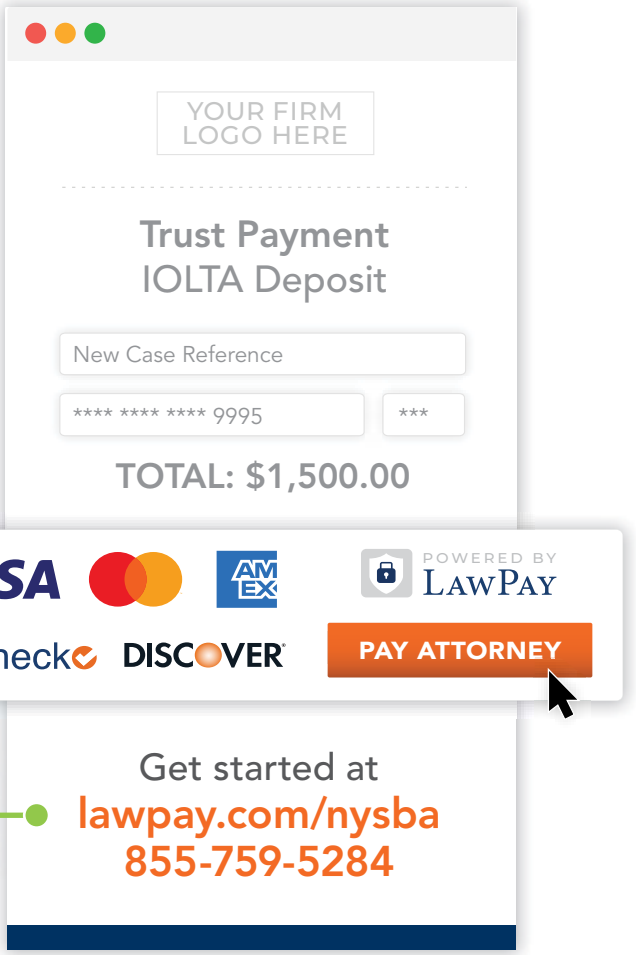
NYSBA®

Member Benefit Provider

> **I love LawPay!** I'm not sure why I waited so long to get it set up.
>
> *– Law Firm in Ohio*

Trusted by more than 150,000 professionals, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

- **22% increase in cash flow with online payments**
- **Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA**
- **62% of bills sent online are paid in 24 hours**



Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Synovus Bank, Columbus, GA.

PUBLICATIONS

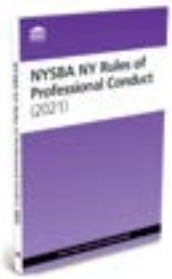
Featured titles available from NYSBA

Attorney Professionalism Forum

The Forum identifies the ethical issues faced by members of the legal profession as they interact with judges, lawyers, clients and the public. It answers thought-provoking questions by blending analysis of applicable law and the Rules of Professional Conduct with practical guidance on how to best act as a professional.

- Book (407821)
- eBook (407821E)

NYSBA Members $65
Non-Members $85



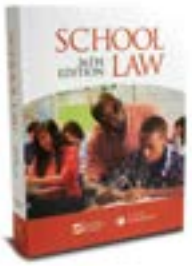
NYSBA New York Rules of Professional Conduct

Effective April 1, 2009. As amended through June 24, 2020. With Comments as amended through October 30, 2021

Protect your practice with your copy of the Rules of Professional Conduct. A much-needed resource of every New York attorney's library, NYSBA's New York Rules of Professional Conduct also includes a Preamble, Scope and Comments.

- Book (403021)
- eBook (403021E)

NYSBA Members $18
Non-Members $28



School Law, 38th ed.

Widely recognized for many years as a valuable resource for attorneys and administrators who handle school law matters, the information in this handbook is primarily presented in an easy-to-use question-and-answer format and has been culled from a variety of sources, including New York statutory and case law, the Rules of the Board of Regents, and more.

- Book (4227620)
- eBook (4227620E)

NYSBA Members $131
Non-Members $150

Other titles also available

Arbitration and Mediation
This practice guide examines the two most common forms of alternative dispute resolution and resolves the misconception that these two procedures are interchangeable by discussing their differences and providing examples of both procedures.
Book: 402422 | eBook: 402422E | 164 pages
Member $125 | List $165

Debt Collection and Judgment Enforcement
Debt Collection and Judgment Enforcement offers guidance on the basics of debt collection, from evaluating the claim and debtor, to demand upon the debtor and payment agreements, to alternatives to litigation.
Book: 423822 | eBook: 423822E | 366 pages
Member $125 | List $165

Social Security Law and Practice
This publication guides you through the various aspects of representing a Social Security disability claimant. Topics covered include eligibility; retirement, disability insurance, SSI and survivors' benefits; overpayments; Medicare; and attorney's fees.
Book: 422922 | eBook: 422922E | 298 pages
Member $125 | List $165

New York Employment Law: The Essential Guide
Covering a wide range of state substantive and regulatory employment issues, this publication is formatted in an easily accessible Question-and-Answer format and offers clear and succinct responses to more than 450 employment law questions.
Book: 410121 | eBook: 410121E | 560 pages
Member $95 | List $130

Labor, Employment and Workers' Compensation Law
Part One of this practice guide provides the general practitioner with an overview of the complex and interrelated issues in labor and employment law. Part Two focuses on the essential questions related to workers' compensation law in New York State.
Book: 41022 | eBook: 41022E | 466 pages
Member $125 | List $165

Lefkowitz on Public Sector Labor and Employment Law, 4th ed
This landmark text is the leading reference on public sector labor and employment law in New York State. The editors bring together leading attorneys in the field to contribute their expertise to this two-volume work.
Book: 42058 | eBook: 42058E | 1,654 pages
Member $160 | List $195

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

CONTENTS

CONNECT WITH NYSBA | VISIT NYSBA.ORG

@nysba @nysba www.nysba.org/LinkedIn @nystatebar nysba

NEW YORK STATE BAR ASSOCIATION
JOURNAL

MARCH/APRIL 2022
VOL. 94 | NO. 2

EDITORIAL OFFICES
One Elk Street, Albany, NY 12207
518.463.3200 • FAX 518.463.8844
www.nysba.org

NYSBA ADVERTISING
MCI USA
Holly Klarman, Account Executive
holly.klarman@mci-group.com
410.584.1960

SUBMISSIONS
Send articles to journal@nysba.org.
Review submission guidelines at
nysba.org/journalsubmission.

Nota
by M&T Bank

Banking built for law firms

Nota is a business banking platform designed specifically for solo and small law firms. And it won't cost you a thing — just open a business checking or IOLTA at M&T[1]

Are you ready to make your life easier?

Law Tech Integrations

- Connect your bank account with **Clio, QuickBooks and LawPay**
- Minimize time spent in multiple systems

Premier Service

- Support from real humans who know law firms
- Branchless account opening saves you time

Best-in-class Pricing

- No monthly maintenance fees
- No wire or ACH fees
- Higher mobile check deposit limits

LawPay
AN AFFINIPAY SOLUTION

intuit quickbooks

Clio

Visit **trustnota.com** today

1 There is no charge for the use of Nota. M&T Bank's standard deposit account and service fees may apply if not enrolled in Nota.

Banking services powered by M&T Bank, Member FDIC.

Nota is a product/service offered by M&T Bank and is available to attorneys whose offices and practices are in NY, NJ, MD, PA, DE, CT, VA, DC, FL, or WV. IOLTA accounts held by lawyers in these states must be subject to applicable state rules and regulations. The advertised product/services and their features and availability are subject to change without notice at any time. Use of the product/service is subject to and governed by certain terms, conditions, and agreements required by M&T Bank.

T. ANDREW BROWN

Want Diversity in the Legal System? Start by Revising Question 26 in the Bar Application

To achieve a more just society, our legal system must reflect the people it serves. That is why we have to move past being aghast at the lack of diversity in the legal profession and get to work removing the barriers to making it more representative.

There's an easy place to start, and that is with Question 26 on the New York State bar admission application. It is an inquiry that violates New York law by asking applicants to disclose all interactions with law enforcement including arrests reaching back into their childhood.

The question has driven away untold Black and Latino students who are subjected to the scrutiny of law enforcement to an extent unimaginable to their white counterparts. We as an association came together at the House of Delegates meeting in January to call for a complete rethinking of the question. Now, it is time for the New York State Unified Court System to revise the question in the bar application.

We cannot afford to wait; we cannot afford to lose more minds that would bring our profession fresh perspective and help deliver fair and equal justice to populations that fail to receive it.

It is a shameful truth that our profession is one of the least diverse occupations. We know, of course, that Question 26 and other questions on the New York bar admission application that warn potential lawyers to reveal all police encounters – including police stops, juvenile records, dismissed cases and arrests that are no longer pending – are not solely to blame for this abysmal situation.

According to a 200-page report from former Homeland Security Director Jeh Johnson, New York does not have an equitable justice system, and we can see that, in part, in how lawyers of color are treated.

His report details how practicing lawyers of color in New York face discrimination from judges, other lawyers, and officers of the court. His review of the court system also found that the diversity of New York's judges does not reflect that of the state.

The lack of diversity is not unique to New York. According to the American Bar Association, 86% of all lawyers are non-Hispanic and white. Compare that to the U.S. population, which is 60% white, and you can see how disparate our profession is.

Take a more granular view, and the numbers become more troubling. Just 5% of lawyers are Black compared to 13.4% of the population. Only 5% of lawyers are Hispanic while 18.5% of the population is. Some 2% of all lawyers are Asian compared to 6% of the population.

But this is not solely about numbers. It is about the human consequences of an unequal system that disadvantages people of color. How can we have an equitable justice system when that very system targets people of color at rates twice that of whites?

In this issue of the Bar Journal, David Marshall, who chaired the New York State Bar Association's Working Group on Question 26 of the New York State Bar Examination Admission Application, discusses the consequences of this bar admission question by relating the story of Hasan Shafiqullah, a young man who was arrested during a gay rights protest. That arrest haunted Shafiqullah through his journey to become a lawyer. Not only was he faced with the prospect that his misdemeanor conviction could cost him entry into law school and subsequently the bar, but that answering questions about the conviction might force him to disclose his sexual orientation to complete strangers.

Marshall's article is revelatory in its breadth and in demonstrating the human toll of Question 26.

Marshall cites a study by the Center for Community Alternatives that shows that for every applicant rejected

by the State University of New York due to a felony conviction, 15 others decided not to apply because of it.

There is no doubt that Question 26 sows fear in students who do not want to invest in a career that may be denied them. And it makes young people who already face bias in the legal system feel even more unwelcome.

Most students are in this predicament through no fault of their own. The statistics show us that policies like stop and frisk led to the unnecessary detention and search of millions of innocent people. A 2019 report by the New York Civil Liberties Union found that since 2002 the NYPD had conducted over 5 million stops of New Yorkers. Nine out of 10 of those New Yorkers turned out to be completely innocent. Over those 16 years, more than half of those stopped were Black, over 30% were Latino and only about 10% were white. So many of those who were stopped were young people who had a bright future ahead of them and now would have to disclose the stop when answering Question 26.

Quantifying how many potential lawyers we have lost to this question makes me shudder. That feeling is only intensified by the substantial evidence that Question 26 and other questions like it that attempt to determine character and morality simply do not work.

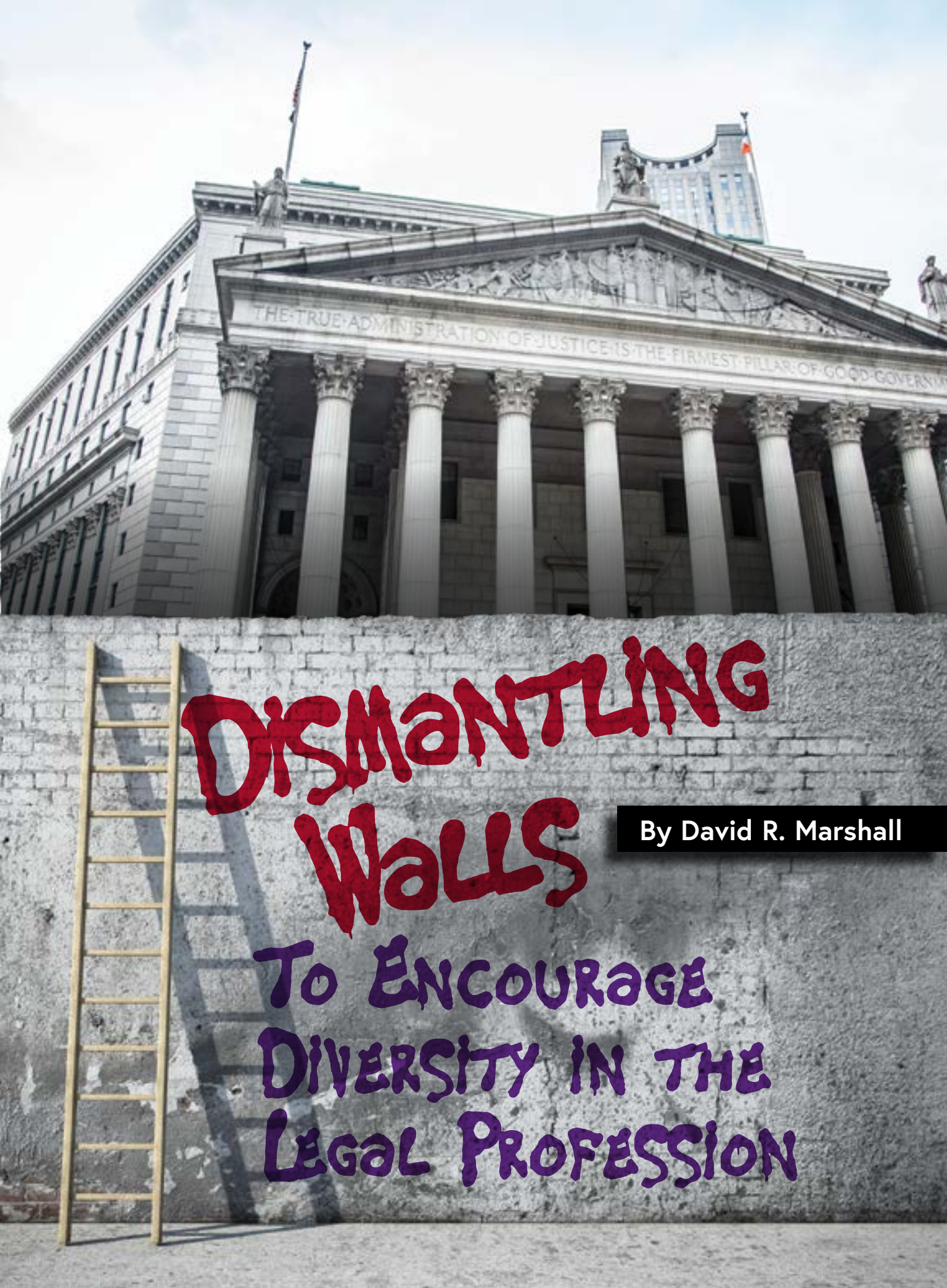
The late Deborah Rhode, a pre-eminent scholar of legal ethics at Stanford Law School, addressed the Connecticut bar on this very issue. She and other academics identified lawyers who disclosed a criminal record and compared their disciplinary history to those attorneys who did not have a record.

The evidence failed to find any correlation between criminal records and subsequent lawyer misconduct.

There is more work ahead of us to address the lack of diversity in the legal profession. Deep systemic change is needed, the kind of change that will take massive reserves of political will, time and effort. For the benefit of our association, the profession, and our citizens, we are committed to that noble battle, no matter how long it takes.

But for now, all we're asking is for the court system to take a small but significant step – remove or amend Question 26 and all other questions that delve into essentially every police encounter – from the application for the bar.

T. Andrew Brown can be reached at abrown@nysba.org.



Dismantling Walls

To Encourage Diversity in the Legal Profession

By David R. Marshall

A record-breaking heat wave had settled over Washington, D.C., in July 1993 when Hasan Shafiqullah joined about 100 other gay rights activists to march from Lafayette Park to the gates of the White House. They hoped to further turn up the heat on President Bill Clinton for his failure to fulfill his campaign promise to issue an executive order banning discrimination against LGBTQ+ individuals in the military. Instead of the promised executive order, President Clinton had visited the National Defense University two weeks earlier to announce the ill-fated "don't ask/don't tell" policy. That policy, as subsequently enacted into law, not only permitted service members to be discharged for disclosing same-sex orientation or activity but led to an increase in discharges of LGBTQ+ service members over the next decade.

Ignoring an order from the D.C. police to disperse despite the peaceful nature of their protest, Hasan and a number of his fellow demonstrators were arrested and charged with engaging in criminal activity. As a self-identified Brown, gay Bangladeshi American immigrant from Tucson, just a year out of the University of Arizona from which he had graduated magna cum laude, Hasan decided to plead guilty to a misdemeanor charge of demonstrating without a permit. At the time, he gave no thought to how that plea might affect his subsequent application to law school or to the New York State bar. As it turned out, Hasan's plea made him a convicted criminal, and as an applicant with a criminal record, he would have to shoulder a burden to prove he was qualified for admission to the New York bar that the majority of other bar applicants do not have to bear.

The New York Bar Application Requires Overbroad Disclosure of Criminal Justice Involvement

The Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York currently requires applicants to disclose any and all criminal justice system involvement, regardless of the outcome or seriousness of the offense, except for parking tickets and certain stale traffic violations. For example, Question 26 on the bar application asks:

> Have you ever, either as an adult or a juvenile, been cited, ticketed, arrested, taken into custody, charged with, indicted, convicted, or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, or been the subject of any juvenile delinquency or youthful offender proceeding? Traffic violations that occurred more than ten years before the filing of this application need not be reported, except alcohol or drug-related traffic violations, which must be reported in all cases, irrespective of when they occurred. Do not report parking violations.

Question 26 is one of at least three questions on the admission application that require disclosure of criminal justice system involvement. To ensure that applicants interpret and respond to these questions in the broadest manner, the bar application instructions warn: "Candor throughout the admission process is required of all applicants, and even convictions that have been expunged should be disclosed in response to this question." Applicants are also instructed that "the burden of proving that an applicant possesses the requisite character and fitness to practice law is borne by the applicant."

Criminal Record Screening Disproportionately Affects Applicants of Color in New York

It is beyond genuine debate that the criminal justice system disproportionately impacts people of color in New York State. A 2018 analysis showed that whites make up 55% of the state's population but only 33% of total arrests, while Blacks make up only 15% of the population but account for 38% of total arrests.[1] Racial disparities are particularly egregious with respect to drug-related arrests. Although surveys show that marijuana and other drug use does not differ by ethnicity or race, except for comparatively higher marijuana use by white college students, "at the height of New York's prosecution of drug crimes, about 90% of people incarcerated for such crimes were Black and Latino."[2] Because contact with law enforcement can generate a criminal record even in the absence of a conviction, an estimated 7.4 million people in New York State have a criminal record, according to a 2010 survey of Bureau of Justice Statistics data.[3]

The racial disparities associated with our criminal justice system prompted the authors of a paper on the use of criminal records in evaluating applicants for college admission to conclude, "Because racial bias, whether deliberate or inadvertent, occurs at every stage of the criminal justice system, screening for criminal records cannot be a race-neutral practice."[4] The chilling effect that criminal record screening may have on people of color considering whether to become lawyers is naturally difficult to quantify. However, a survey conducted by the Stanford Center on the Legal Profession found that "many individuals with criminal records are deterred from applying to law school in the first place."[5] The Stanford Center surveyed 88 people with criminal records, more than half of whom indicated that they were considering applying to law school. When they were asked why they had not yet applied, "over half cited concern about passing the moral character component as one of the top three reasons."[6] One respondent to the Stanford Center survey wrote in the comments: "'I thought because I had a felony there was no chance[,] so I never tried.'"[7]

In a related and instructive context, the Center for Community Alternatives studied the impact of criminal record screening on applicants for admission to the State University of New York system of colleges and universities. The Center found that "for every one applicant rejected by Admissions Review Committees because of a felony conviction, 15 applicants are excluded by felony application attrition. This suggests it is the questions about criminal history records, rather than rejection by colleges, that are driving would-be college students from their goal of getting a college degree."[8] Coupled with the Stanford Center survey of prospective bar applicants, the Community Alternatives study of college applicants supports the inference that criminal record screening requirements have a ripple effect which flows from the bar application through law schools down to the college and high school level that may be contributing to the obvious under-representation of people of color at the bar and on the bench.

"Of the 15 law schools in New York, all but one – University at Buffalo School of Law – require applicants for admission to disclose criminal record information on their application forms."

The American Bar Association reported in 2020 that although African Americans represent about 13% of the United States population, only 5% of all lawyers in the United States are African American.[9] This disparity is replicated in other communities of color. The Hispanic community produces 5% of American lawyers but represents 19% of the United States population. Only 2% of licensed attorneys are Asian American, even though the Asian American community accounts for about 6% of the United States population. Native Americans represent less than one-half of 1% of licensed attorneys.[10] The dearth of lawyers from communities of color naturally affects the diversity of the judiciary. Although the New York State judiciary is more diverse than the federal bench, approximately 70% of New York State judges identify as non-Hispanic whites while 14% of New York State judges are African American, 9% are Hispanic American, and 3% are Asian American.[11]

The Bar Application Questions About Criminal Records Violate Applicable Law

The New York State Human Rights Law (Executive Law § 296(16)) prohibits "mak[ing] any inquiry about" arrests that terminated in favor of the arrestee, adjournments in contemplation of dismissal, certain juvenile and youthful offender adjudications, and sealed convictions in connection with "the licensing, housing, [or] employment" of an applicant. This prohibition expressly applies to any "person, agency, bureau, corporation or association, including the state and any political subdivision thereof." The Family Court Act (§ 380.1(3)) provides that juvenile and youthful offender adjudications under the act "shall not disqualify a young person from receiving any license from a public authority." Consistent with these laws, judges issuing dispositions in the juvenile court system typically advise youthful offenders that records pertaining to the matter are not public and should not prevent them from seeking higher education, gainful employment, or public office in the future.

Although the Human Rights Law and Family Court Act contain certain exceptions to the prohibitions against criminal record inquiries and disqualifications – including, for example, for the licensing of firearms or the employment of law enforcement personnel – no exception is provided for the licensing of lawyers. On the contrary, New York Judiciary Law § 53(1), which authorizes the Court of Appeals to adopt rules regulating admission of attorneys to practice, limits that authority to rules that are "not inconsistent with the constitution or statutes of the state."

Because the Bar Application Requires Criminal Record Disclosure, New York Law Schools Do, Too

Of the 15 law schools in New York, all but one – University at Buffalo School of Law – require applicants for admission to disclose criminal record information on their application forms. Most law schools request disclosure that is identical or substantially similar in scope to the information requested in Question 26 of the bar application. A few schools limit their requests to convictions, but even those schools require disclosure of juvenile and youthful offender adjudications.

When the New York deans and directors of law school admissions were asked in a recent informal survey by NYSBA's Committee on Legal Education and Admission to the Bar (CLEAB) why their schools request criminal record disclosure from applicants, nearly two-thirds said they do so because the bar application asks for that infor-

Hasan Shafiqullah speaking to press in October 2019.

mation. Another one-third said that their schools make the request to comply with ABA Accreditation Council rules that require law schools to admit only students who they reasonably believe can be admitted to the bar, including passing the criminal record screening part of the state's character and fitness review. As a result, for all practical purposes, law school admissions officials become the front line in fielding inquiries about the criminal record disclosure requirements on the bar application.

From her post on the front line of criminal record screening, the assistant dean of admissions at St. John's University School of Law, Alicia Meehan, described a recent call from an attorney for a prospective applicant to the school. First, the attorney criticized the question on St. John's application, which mirrors Question 26 on the bar application, as unreasonably vague because the language did not fit the categories of offenses in the penal code of the state where his client lived. Then, he requested that Dean Meehan advise him whether his client's infraction in the other state must be disclosed on his law school application. Dean Meehan acknowledged that his client's answer on the law school application was critically important because New York bar officials are known to assess applicants' candor by comparing their law school application answers to their answers on the bar application. Nevertheless, despite her sympathy for his client's predicament, Dean Meehan told the frustrated attorney that she couldn't advise him how his client should answer the question because it was impossible for her to predict how the bar's character and fitness committee members would interpret the criminal record disclosure requirements or how they would evaluate his client's fitness to practice in light of his decision to disclose or omit his criminal justice involvement.

According to 86% of the respondents to CLEAB's survey, admissions officers regularly field questions from prospective law students about criminal record disclosure requirements. Dean Meehan has for more than a decade attended and spoken at conferences of pre-law advisors who counsel college students interested in careers in the law and assist with their law school applications. She reports that a common refrain among pre-law advisors when discussing how to counsel students with criminal justice involvement is to tell students that they must "disclose, disclose, disclose." She observed that this apparently widespread advice leads to over-disclosure, which is burdensome for both the student and the screeners of those applications. Nevertheless, none of the New York admissions officers who were surveyed stated that they were "confident" that New York bar officials would be "unlikely" to deny admission to a bar applicant as long as the applicant candidly and completely disclosed his or her criminal justice involvement.

When Hasan Shafiqullah applied to Hastings College of the Law at the University of California in 1994, several months after his misdemeanor conviction in D.C., he was surprised to discover questions about criminal justice involvement on the application form. He worried whether he had to disclose his conviction and, even more troubling, whether he would be asked to explain

the circumstances of his conviction and forced to come out as gay to the admissions officers and faculty at Hastings. Only eight years earlier, the U.S. Supreme Court had decided in *Bowers v. Hardwick* that Georgia's law criminalizing sodomy, even when in private between consenting adults, was constitutional. At that time, anti-sodomy laws appeared in the penal codes of two dozen states in addition to Georgia, which imposed a penalty of up to 20 years imprisonment under its statute. Such laws withstood federal constitutional challenge for another decade before the Supreme Court overruled *Bowers* in *Lawrence v. Texas*. Fortunately for Hasan, the Hastings admissions officer who answered his call told him that Hastings required disclosure of felony convictions, but not misdemeanor convictions. Hasan was admitted to Hastings and graduated in 1997.

While Hasan's misdemeanor conviction did not need to be disclosed for the Hastings application, it does need to be disclosed for application to the New York State bar. Dean Meehan is aware of instances in which the breadth and vagueness of the criminal record disclosure questions on bar applications like New York's has prompted pre-law advisors to encourage their students with criminal justice involvement to retain counsel to assist them with their law school applications. These advisors have also suggested to their college students with criminal convictions that they should plan on hiring counsel to accompany them to their character and fitness interviews when they apply for admission to the bar. The Stanford Center on the Legal Profession at Stanford Law School has estimated that retaining counsel to advise a bar applicant during a state bar character and fitness investigation can cost up to $20,000.[12] It is not difficult to imagine the chilling effect on a college student's desire to pursue a career in the law when the student hears that involvement with the criminal justice system will likely require not only paying for law school, but also hiring a lawyer and paying a hefty fee simply to be given the opportunity to prove to the bar's character and fitness committee that he or she should be admitted.

Criminal Record Screening Does Not Reliably Detect Bar Applicants Who Are Likely To Violate Attorney Disciplinary Rules

Criminal record screening is usually justified on the ground that it identifies applicants to the bar whose prior crimes are reliable evidence of the risk they pose of future professional misconduct that could harm clients and injure the reputation of the legal profession. The late Professor Deborah Rhode, a pre-eminent scholar of legal ethics who founded the Stanford Center on the Legal Profession, studied the character and fitness process used by state bar officials for many years and concluded that "[t]here is no basis for assuming that one illegal act, committed many years earlier under vastly different circumstances, is a good predictor of current threats to the public."[13] According to Professor Rhode,

> individuals can be exemplary with respect to some key traits but not others, and their character-related qualities can vary across situations and evolve over time. That should make us wary about sweeping claims that when it comes to character, individuals either have it or they do not. Yet . . . , legal decision makers too often make such misleading generalizations about moral character based on a single unrepresentative 'bad act.'[14]

Scholars from the University of Connecticut have gathered empirical data to evaluate the proposition that a propensity to engage in professional misconduct can be inferred from the criminal records disclosed by applicants for admission to the bar.[15] Examining the admissions files of applicants to the Connecticut bar from 1989 to 1992, they identified the applicants who had disclosed criminal records prior to their admission and compared their subsequent disciplinary history for a 20-year period to the disciplinary history of a random sample of admitted attorneys who did not have a criminal record. They found that "the information collected during the character and fitness inquiry does not appear to be very useful in predicting subsequent lawyer misconduct."[16]

The New York State Bar Association Recommends Eliminating Illegal Criminal Record Inquiries From the Bar Admission Process

When Hasan Shafiqullah applied for admission to the New York State bar in 1998, he was again confronted with a demand to disclose his criminal record history. Once more, he had to suffer the stress induced by the prospect that he would be forced to "come out" to complete strangers on the Third Department Character and Fitness Committee if they required him to explain during his personal interview the circumstances surrounding his misdemeanor conviction. Because interviewers have discretion to probe or ignore any of an applicant's answers to the character and fitness questionnaire, it was impossible to predict for Hasan what he might be asked or what details he might have to provide to satisfy his interviewer's concerns. With no choice but to accept that risk, Hasan filled out the bar application and flew to Albany for his interview. As luck would have it, and to Hasan's relief, his interviewer did not ask him about his criminal record. He was admitted to the New York bar that same afternoon, returned to his law firm in California, and the following year secured a job in New York with Queens Legal Services.

In Hasan's case, fortune favored both the applicant and the residents of the State of New York. Lucky to be spared the embarrassment and cost of proving fitness to

an interviewer whose attitudes toward criminal justice involvement could have been far less tolerant, Hasan for 20 years has dedicated his skills and energy to serving the indigent and the legal profession in New York. Today, he works as attorney-in-charge of the Immigration Law Unit at The Legal Aid Society, managing a team of almost 100 attorneys, paralegals, and social workers handling immigration-related matters in various administrative and court proceedings. He also serves as a member of the Committee on Immigration Representation and the House of Delegates of the New York State Bar Association. In less fortuitous circumstances, however, it is fair to assume that many aspirants to a legal career, who may lack Hasan's courage to risk embarrassment and possible denial of admission, might decide to pursue other careers when confronted with the criminal justice disclosure requirements that currently appear on applications to law school and the bar in New York.

In January 2022, nearly 85% of Hasan's colleagues in NYSBA's House of Delegates joined him in voting to eliminate impermissible criminal record questions from the bar application in accordance with the Report and Recommendations of the Working Group on Question 26 of the New York Bar Admission Application.[17] That report recommends that the Court of Appeals and the Administrative Board of the Courts:

> (1) revise the bar application so that it complies fully with the New York State Human Rights Law and Family Court Act;
>
> (2) state in the preamble to the bar application that applicants are not required to disclose in response to any question, oral or written, including but not limited to Question 26, information about (i) arrests not then pending that did not result in conviction, (ii) sealed convictions,[18] (iii) adjournments in contemplation of dismissal, and (iv) juvenile and youthful offender adjudications; and,
>
> (3) arrange for the training of Character and Fitness Committee members and court personnel involved in the bar admission process to ensure that their review of bar applicants' convictions is limited to permissible conviction inquiries and, as to those convictions, complies with Article 23-A of the New York Corrections Law.

It is impossible to quantify the chilling effect that criminal record screening has on young people who have the necessary talent and ambition to become lawyers but who come from communities that are under-resourced and over-policed, making them less likely to seek to become members of the bar. It is difficult to know how much the reputation of the legal profession is tarnished in those communities when the profession declines to correct a patently unlawful practice on the ground that statistical proof of the practice's effect is purportedly too thin. According to Eulas Boyd, the dean of admissions at Brooklyn Law School, he and his colleagues make an enormous and continuous effort simply to maintain the number of students of color admitted to law schools in New York. Last year, after making nearly 16,000 offers in response to 62,000 applications, the 15 New York law schools enrolled 4,515 first year students, of which only 335 are African American and ten are Native American, Alaskan or Pacific Islanders. Consequently, for Dean Boyd, "Magnitude of harm is not the issue – any single person of color chilled by the bar application's criminal record disclosure requirement is too much."

David R. Marshall is chair of NYSBA's Working Group on Question 26 of the New York Bar Application and co-chairs the Committee on Legal Education and Admission to the Bar. He is an adjunct professor and the director of the Center for Labor and Employment Law at St. John's University School of Law. He began his career at the National Labor Relations Board in Washington, D.C., before entering private practice and was most recently of counsel at Locke Lord.

Endnotes

1. Report to the New York State Court's Commission on Equal Justice in the Courts, The Judicial Friends Association, at 24–25, Aug. 31, 2020, https://www.nycourts.gov/LegacyPDFS/ip/ethnic-fairness/pdfs/Judicial-Friends-Report-on-SystemicRacism-in-the-NY-Courts.pdf.
2. *Boxed Out: Criminal History Screening and College Application Attrition*, Center for Community Alternatives, at 41–42, March 1, 2015, https://www.communityalternatives.org/wp-content/uploads/2019/boxed-out.pdf.
3. *Id.*
4. Marsha Weissman et al., *The Use of Criminal History Records in College Admissions: Reconsidered*, at 25 (Nov. 2010), http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf.
5. Caroline Cohn, Debbie Mukamal, Robert Weisberg, *Unlocking the Bar: Expanding Access to the Legal Profession for People with Criminal Records in California*, Stanford Law School, Stanford Center on the Legal Profession, at 31, July 15, 2019, https://law.stanford.edu/publications/unlocking-the-bar-expanding-access-to-the-legal-profession-for-people-with-criminal-records-in-california/.
6. *Id.*
7. *Id.*
8. *Boxed Out: Criminal History Screening and College Application Attrition*, Center for Community Alternatives, at 13, March 1, 2015, https://www.communityalternatives.org/wp-content/uploads/2019/11/boxed-out.pdf.
9. *See* American Bar Association, ABA Profile of the Legal Profession 2020 at 34, https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf.
10. *Id.*
11. *See* 2020 Statewide Judicial Demographics Report, https://ww2.nycourts.gov/court-research/srjd-report.shtml.
12. Cohn, *et al., supra,* at 70.
13. Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 Law & Social Inquiry 1027, 1034 (2018).
14. *Id.* at 1030.
15. Leslie C. Levin, Christine Zozula, Peter Siegelman, *A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline*, University of Connecticut, March 15, 2013, http://ssrn.com/abstract=2258164.
16. *Id.* at 42.
17. *See* Report and Recommendations of the Working Group on Question 26 of the New York Bar Application, The New York State Bar Association (Jan. 2022), https://nysba.org/app/uploads/2021/11/H6.-Working-Group-on-Question-26-NYS-Bar-Exam-Admission-App-APPROVED-HOD-1.22.2022.pdf.
18. Under New York Criminal Procedure Law (CPL) § 160.59, a person can seal at most one felony, provided that the person has been crime-free for 10 years since the later of the person's conviction or release from custody. Sex offenses, violent felonies, and serious felonies are not eligible for sealing under CPL § 160.59. A notice of motion to seal an eligible record must be filed with the relevant district attorney and, if opposed by the D.A., can be granted by the court only after a hearing. CPL § 160.59(6).

#MeToo: Building Inclusion To Break Down Barriers

by Taa Grays, Clotelle Drakeford, Mirna Santiago and Mishka Woodley
Members of the Task Force on Racism, Social Equity and the Law

The #MeToo movement has had a seismic impact on raising awareness of how women are victimized by more powerful men, particularly in the workplace. Yet, the movement has not effectively served as a platform for women of color who are also victims of sexual harassment.

This concept of two different diverse identities not being recognized under the law was posited by Kimberlé Crenshaw in 1989. She coined the term "intersectionality" to describe how the law failed to understand discrimination facing individuals with overlapping identities. She explained in a 2019 Vox article:

> Intersectionality was a prism to bring to light dynamics within discrimination law that weren't being appreciated by the courts. In particular, courts seem to think that race discrimination was what happened to all Black people across gender and sex discrimination was what happened to all women, and if that is your framework, of course, what happens to Black women and other women of color is going to be difficult to see.

At the recent Presidential Summit, Taa Grays, co-chair of the Task Force on Racism, Social Equity and the Law, highlighted this gap in the movement's efforts.

Intersectionality of Race and Gender in Sexual Harassment

NYSBA President T. Andrew Brown created the Task Force on Racism, Social Equity and the Law to examine how structural racism permeates and influences various facets of daily life leading to injustice and inequality among New Yorkers. Through its six committees – housing, environmental justice, health, economic opportunities, criminal justice and education – the task force will explore barriers and disparities derived from existing law and public policy and deliver a report recommending affirmative steps that NYSBA can take to lessen the impact of structural racism and drive meaningful and enduring societal transformation.

Paula C. Johnson, professor of law at Syracuse University College of Law, explained to the task force at its Oct. 25 public forum that "structural racism is a system of laws, policies, and institutional practices that produce and perpetuate racial inequities and inequalities in the United States. The impact of structural racism can operate in discrete, interconnected, and synergistic ways."

There is a saying in the Black community that "when white people have a cold, Black people have the flu." While both communities will face a similar challenge,

it tends to manifest itself more harshly or dramatically in the Black community. This manifestation repeatedly emerges on both the micro and macro level, thus synergistically and methodically eroding the diligent efforts of individuals and communities acting as catalysts for change.

Black women and people of color experience racialized sexual harassment. Historically, women of color were considered property, seen as concubines or stereotyped in terms of their sexuality. Unfortunately, the legacy of those perceptions fuels Black women and people of color experiencing higher rates of sexual harassment and assault than white women.

Various reports and studies document that women of color face sexual harassment and assault at a higher rate than white women. A National Women's Law Center 2018 report titled "Out of the Shadows" found that Black women and Latina women filed more sexual harassment complaints with the Equal Employment Opportunity Commission than white women. A Department of Justice study found that Native American women are 2.5 times more likely to experience sexual assault than all other races. Last, according to the National Latina Network, one out of three Latinas has experienced some sort of domestic violence.

In October 2017, Jane Fonda said during an interview with MSNBC that #MeToo has gained attention because "so many of the women that were assaulted by Harvey Weinstein are famous and white." She also said, "this has been going on for a long time to Black women and other women of color, and it doesn't get out quite the same." Women of color have long felt that the #MeToo movement should incorporate and advocate for bringing this understanding into the dialogue.

Sung Yeon Choimorrow, executive director of National Asian Pacific American Women's Forum, explained intersectionality in the context of the #MeToo movement in a March 19, 2021 New York Times article entitled "Tales of Racism and Sexism, From 3 Leading Asian-American Women":

> In the #MeToo movement, we never really talked about the unique way that Asian-American women experience sexual harassment. So often, people want to talk about race, so they want me to leave my gender at the door. People want to talk about sexual harassment, so they want me to leave my race at the door. And so I become invisible.

Ironically, the #MeToo movement was created by an African American woman, Tarana Burke, to address this marginalization of the Black women experience. In her

own words, Tarana Burke developed #MeToo in 2016 "[t]o support and activate survivors, the #MeToo movement engages an innovative model of survivor leadership with a 'whole-self approach' to healing from sexual violence, that grows out of understanding survival." Burke addressed the perceived invisibility of women of color in the movement in a Feb. 24, 2021 article. She stated that when the Harvey Weinstein scandal happened, "Black women just kept saying, 'Where are WE? Where ARE we? Where do we show up?'"

Frustrated with this lack of inclusion, in February 2021, Tarana Burke, Monifa Bandele, chief operating officer of Time's Up Foundation, and Fatima Goss Graves, president and chief executive officer of the National Women's Law Center, created another organization called "We, As Ourselves," which "aims to reshape the narrative about sexual violence and its impact on Black survivors."

To many, the #MeToo movement has focused on gender only. It has not also highlighted how women of color experience sexual harassment in similar but unique ways due to race. As the #MeToo movement continues to evolve, there still is an opportunity to highlight the stories of women of color.

First, the issue must be acknowledged more broadly. Jane Fonda identified it, but others that have been vocal or leaders in the movement need to acknowledge and expressly commit acting upon it as well.

Additionally, the #MeToo movement must move beyond merely highlighting the stories of victims but further invest its efforts and resources in dissecting the root cause of sexual harassment and abuse to strategically and effectively attack head-on the existence of racialized sexual harassment and abuse. Tsedale M. Melaku, in a Fair Observer article titled "It's Time for #MeToo To Address Structural Racism," explains: "The #MeToo movement relates to sexually predatory behavior experienced within a power dynamic that suggests women are subordinated." Add race to a power dynamic founded on systemic racism and it becomes clear that institutions must do more to address abuses of power perpetuated against women of color.

There is an enduring and harmful misconception that the racial disparity is heavily dependent upon the socioeconomic status and class of the women of color at issue. This concept is not only false but devastating to the furtherance of women and the #MeToo movement holistically. Women of color of all status are overshadowed by their similarly situated white female counterparts, thus requiring us to acknowledge the breadth and depth of the impact of systemic racism on our entire community.

For the #MeToo movement to transcend race, those in leadership positions and influential roles must demonstrate allyship to expand the narrative to include the experiences of women of color whose stories are not getting equal footing with those of white women. Ava DuVernay raised this point in October 2017. When Rose McGowan's Twitter account was suspended because of her open criticism of Weinstein, a movement to boycott Twitter emerged under the hashtag "womenboycotttwitter." DuVernay responded by calling out allies for not doing the same for women of color in her tweet: "Calling white women allies to recognize the conflict of #WomenBoycottTwitter for women of color who haven't received support on similar issues."

Being an ally means sharing the stories of women who have been marginalized, excluded or just not considered. Being an ally also means consistently advocating to ensure inclusion of those women. It is only when all lawyers take these actions will the #MeToo movement reflect ALL women equally.

Taa Grays, Secretary of NYSBA, is also co-chair of the NYSBA Task Force on Racial Injustice and Police Reform. She is vice president and associate general counsel of information governance, MetLife Legal. Grays is a former assistant district attorney with the Bronx District Attorney's Office in its rackets bureau. She received NYSBA's Diversity Trailblazer Award in 2008 and the New York City Bar Association recognized her as a Diversity Champion in 2015.

Clotelle L. Drakeford is an associate attorney for special litigation and program counsel with the Legal Aid Society of Westchester County. She previously worked as a solo practitioner, handling labor and employment matters, police misconduct cases and workplace investigations. She has served as treasurer and Young Lawyers Section liaison for NYSBA's Trial Lawyers Section. She also serves on the Committee on Character and Fitness for the New York State Supreme Court, Appellate Division, Third Department.

Mirna Martinez Santiago is the founder of Girls Rule the Law, an organization to introduce middle and high school girls to the law. She is a DEI consultant at www.mirnasantiago.com and co-chairs NYSBA's Committee on Diversity, Equity and Inclusion. Santiago has been featured in Latina magazine and on NBC News speaking about Afro-Latina experience.

Mishka Woodley is an assistant counsel for the State University of New York Office of General Counsel. She provides legal counsel for various SUNY campuses with a special focus on student affairs and health care, in addition to the SUNY Student Conduct Institute. Woodley is a member of NYSBA's House of Delegates and co-chairs the Health Committee of the Task Force on Racism, Social Equity and the Law.

Why Ex-Felons Should Serve on Juries – and Why New York Should Lead the Way

By Sheldon Siporin

Should former felons be allowed to serve on juries in New York?

This idea is far from radical and follows current trends. The civic rights of former felons have been restored in other areas. Some years ago, New Yorkers paroled after incarceration for a felony could only have their right to vote restored on an individual basis. This required a partial executive pardon. On May 4, 2021, then-New York Governor Andrew Cuomo signed legislation to end felony disenfranchisement. This automatically restored the right of felons on parole to vote in all elections.[1]

New York is a frontrunner in such reform, and felons in many states do not have such rights. Notably, the recently proposed federal Freedom to Vote Act would likewise

restore federal voting rights nationwide to people with felony convictions after they have been released from prison. New York could continue to lead reforms by also restoring jury service rights to former felons. However, at present, New York Judiciary Law § 510(3) specifically provides that, "In order to qualify as being a juror . . . a person must not have been convicted of a felony." This exclusion is of unlimited duration.

Rights of Minorities

This issue not only affects the rights of felons but also impacts the justice system itself. As Justice Powell, writing in *Batson v. Kentucky*,[2] declared, "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[3] It does so by biasing the jury pool by eliminating a larger percentage of Black as compared to white persons. This disparity in numbers can be attributed in large part to law enforcement's record of targeting and arresting Blacks in far higher numbers than whites who commit similar crimes – for example, in street sales of crack vs. suburban cocaine parties.

Biased Juror Pool

Recent articles have criticized the overrepresentation of Blacks among ex-felons throughout the United States as resulting in skewed juror exclusion.[4] In 2010, approximately 33% of African American males were statutorily excluded from the jury pool in New York State due to felony convictions.[5] Once again, the reason for the high percentage can be attributed to concerns about judicial diversity, systematic racism and implicit bias in law enforcement and sentencing. There is no reason to believe this racial disparity has decreased.

Virtue-Based Restrictions on Constitutional Rights

Are former felons just "bad people" to be denied their constitutional rights? Historically, exclusion was justified on the ground that felons lacked "requisite character." This was noted by the majority opinion in the Seventh Circuit case of *Kantor v. Barr,* a Second Amendment case in which Justice Amy Coney Barrett dissented.

Kantor was convicted of the nonviolent felony of mail fraud. He served his time and was not charged with further criminal activity. However, his felony conviction permanently prohibited him from owning a firearm under federal and Wisconsin law. The Seventh Circuit stated the historical justification for disarming felons was tied to the concept of a virtuous citizenry, citing precedent:

> In *United States v. Yancey*, we opined that "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'"[6]

"Recent articles have criticized the over representation of Blacks among ex-felons throughout the United States as resulting in skewed juror exclusion."

> The majority concluded, 'In sum, the government has established that the felon dispossession statutes are substantially related to the important governmental objective of keeping firearms away from those convicted of serious crimes."[7]

Justice Barrett strongly dissented in a voluminous and passionate opinion, asserting:

> Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons. Nor have the parties introduced any evidence that founding-era legislatures imposed virtue-based restrictions on the right; such restrictions applied to civic rights like voting and jury service, not to individual rights like the right to possess a gun.[8]

She continued:

> The federal and Wisconsin laws would stand on solid footing if their categorical bans were tailored to serve the governments' undeniably compelling interest in protecting the public from gun violence. But their dispossession of all felons – both violent and nonviolent – is unconstitutional as applied to *Kantor*.

In short, Justice Barrett said an ex-felon is not an irredeemably bad person to be stripped of constitutional

rights, and especially where all felonies are not created equal. Her logic applies equally to jury disqualification.

Heart and Lungs of Democracy

Although Justice Barrett seemed less concerned with virtue-based restrictions on voting rights and jury service, these are as fundamental as Second Amendment rights.

In 1744, John Adams famously wrote: "Representative government and trial by jury are the heart and lungs of liberty."[9] Democracy falls short when it comes to fair and equal voting rights and the right to a fair unbiased jury trial. The suggestion that all former felons are immoral and thus disqualified from jury service is an illogical argument. It makes no more sense than automatically disqualifying them from voting rights or weapons possession. There seems no compelling state interest to justify such automatic and blanket ban.

State and Federal Constitutional Protections

The right to a trial by a jury of one's peers is protected under the Sixth Amendment to the U.S. Constitution. Moreover, this is restated in New York Judiciary Law § 500: "It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community."

The exclusion of all former felons from jury service discriminates against minorities due to their disproportionate representation in the pool of felons. This hinders the jury pool from being a fair cross section of the community. New York has restored a felon's right to vote based on the harm caused by such bias. It is also time to end felony juror exclusion.

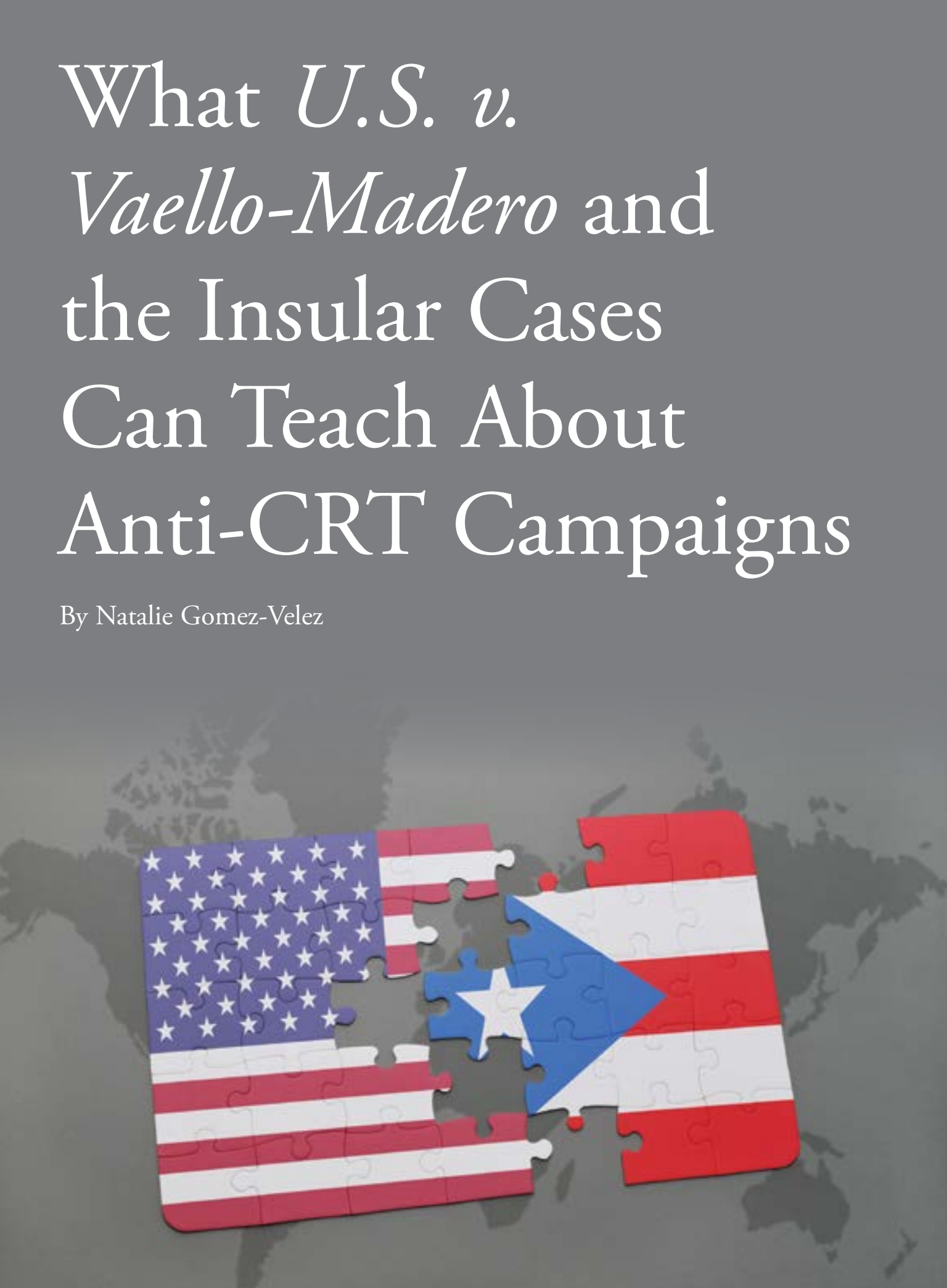
Sheldon Siporin is a New York attorney, a member of NYSBA, and an adjunct professor of psychology at Pace University.

Endnotes

1. According to the Brennan Center for Justice, New York's disenfranchisement policy was rooted in Jim Crow-era attempts to evade the Fifteenth Amendment's mandate that Black men be given the right to vote. *See* Brennan Center for Justice, *Voting Rights Restoration Efforts in New York*, https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york.
2. 476 U.S. 79 (1986)
3. *Id.* at 87 (1986)
4. Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People With Criminal Records*, Prison Policy Initiative, Feb. 18, 2021, https://www.prisonpolicy.org/reports/juryexclusion.html.
5. Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York,* CUNY Law Review 13:2 (Summer 2010), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1276&context=clr.
6. *U.S. v. Yancy*, 621 F.3d 681, 684–85 (7th Cir. 2010).
7. *Id.* at 450.
8. *Id.* at 451.
9. *A Forgotten History: Trial by Jury and the American Revolution*, West Virginia Association for Justice, https://www.wvaj.org/?pg=TrialbyJuryAmericanRevolution.

What *U.S. v. Vaello-Madero* and the Insular Cases Can Teach About Anti-CRT Campaigns

By Natalie Gomez-Velez



Critical Race Theory (CRT) has contributed to a meaningful understanding of how U.S. history and law have engendered systemic racism. As Kimberlé Crenshaw explains, "Critical race theory explores how racial inequality was historically structured into the fabric of the republic, reinforced by law, insulated by the founding Constitution and embedded into the infrastructure of American society." CRT has served as an analytical tool to examine structural inequality as a means to help improve equity and contribute to the constitutional task of forming a "more perfect union."

However, as recent multiple incidents of race-based discrimination have caused many in the U.S. to wrestle with systemic racism through anti-racism education and training, a fierce backlash has emerged. This backlash includes spurious attacks on CRT and other anti-racism work and calls for banning it in public schools, universities and workplaces. Recent politically funded attacks on CRT seek to prohibit teaching about systemic racism, racial subordination and/or inequity in the U.S. For example, a federal "Stop CRT Act" bill would prohibit promoting any "race-based theory," including that "any race is inherently superior or inferior to any other race" among other restrictions. According to Education Week, "Since January 2021, 33 states have introduced bills or taken other steps that would restrict teaching critical race theory or limit how teachers can discuss racism and sexism." Such efforts are continuing in 2022. For example, on Jan. 11, 2022, Florida's Republican governor called for a law that would allow parents to sue school districts that teach critical race theory. On Jan. 17, 2022, his first day in office, Republican Governor Glenn Younkin of Virginia issued an executive order banning "inherently divisive concepts" including CRT. This coordinated effort seeks to prohibit teaching or discussing the United States' history of subordination based on race, gender, ethnicity, among other markers. Its aim is to foster a notion that official U.S. discrimination either never existed or is irrelevant "history" whose existence and current manifestations should be ignored.

But sadly, laws based on racism and inequality are not only vestiges of the past that impact current society. Discriminatory laws still exist in the United States and have significant implications that all Americans should learn about. On Nov. 9, 2021, the U.S. Supreme Court heard arguments in a case that exemplifies the impact of discriminatory laws that draw legal distinctions based on racist doctrine in what are known as the "Insular Cases." The case, *U.S. v. Vaello-Madero*, provides a stark example of the discriminatory impact of the Insular Cases and the Supreme Court's failure to overturn them.

Put simply, the Insular Cases deny the equal humanity of residents of Puerto Rico and other "unincorporated" territories based on racist classifications of those residents. As noted in the amicus brief filed by LatinoJusticePRLDEF, the Insular Cases describe inhabitants of Puerto Rico and other unincorporated territories as "savage tribes" and "alien races" whose incorporation as full and equal citizens would create "grave questions . . . from differences of race, habits, laws, and customs of the people." There is no mistaking the stark racist rationale behind the second-class status of the unincorporated territories that has led to the arbitrary and unequal treatment of their residents – notwithstanding their status as U.S. citizens. In addition to their racist basis, the Insular Cases are at the core of a U.S. "colonies problem" that must be addressed if U.S. constitutional commitments to equality and justice are to be met.

The question for the court is whether aged, blind and disabled citizens eligible for Supplemental Security Income who are excluded solely because they live in Puerto Rico (a U.S. territory that has been held without federal voting power for more than 120 years) are denied equal protection under the U.S. Constitution's Fifth Amendment.

The facts show a blatant denial of equal protection. Vaello-Madero is a U.S. citizen. While living in New York, he suffered a serious illness that left him unable to work. He was eligible, applied for and began receiving SSI benefits. A year later, he returned to Puerto Rico to be closer to family. He continued to receive SSI. About three years later, the Social Security Administration notified Vaello-Madero that it was revoking his benefits retroactive to when he established residency in Puerto Rico – again, a U.S. territory – because he was allegedly "outside the United States." Worse yet, the U.S. government sued Vaello-Madero to recover $28,081 in alleged SSI overpayments. Vaello-Madero, after being appointed an attorney, fought back. He asserted that denying SSI to eligible U.S. citizens solely because they reside in Puerto Rico violated equal protection under the Fifth Amendment to the U.S. Constitution.

The inequitable denial, revocation and clawing back of Vaello-Madero's SSI benefits is based on classifications in the Insular Cases that mark Puerto Rico and other U.S. territories as "foreign in a domestic sense." If that phrase sounds like it makes no sense, that is because it doesn't. It is the product of a twisted logic intent on maintaining the subordination of certain U.S. territories because of blatantly racist assumptions about their people. For example, in *Downes v. Bidwell*, 182 U.S. 244 (1901), the most prominent of the Insular Cases, Justice Henry Billings Brown, the author of *Plessy v. Ferguson*'s long discarded racist "separate but equal" doctrine, wrote that the U.S. overseas territories were "inhabited by alien races, differing from us in religion, customs, . . . and modes of thought," making it impossible to govern "according to Anglo-Saxon principles."

The U.S. is reckoning with indisputable evidence of the harms of systemic racism in the wake of police killings of George Floyd, Breonna Taylor and so many other unarmed Black, Latinx and marginalized people. Further evidence of stark inequality based on race, ethnicity and class revealed by the COVID-19 pandemic make the need to address inequality based on race, ethnicity, gender and nationality all the more urgent. What is needed is fact-based education about the roots of today's inequality and the structures that exacerbate it as part of an honest effort to foster greater equality in law and society. This is exactly the opposite of what the "Stop CRT" political campaigns seek. There is a compelling need to address the implications of the United States' long history of subordination based on race, ethnicity, gender, and class. More imperative yet is the need to rid U.S. law of the racist doctrine embodied in the Insular Cases.

To catalyze needed changes in the law, honest, fact-based education is critical. There must be a broader understanding that "legal" racial subordination is not just a matter of history. In regard to U.S. territories and their approximately four million inhabitants, it is current law. This must change. As U.S. House Natural Resources Committee Chair Raúl M. Grijalva (D-Ariz.) and other representatives spelled out in H.Res. 279, the Insular Cases "are contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law."

The New York State Bar Association is taking important steps to raise awareness about this legal anachronism and the need to change it. On June 17, 2021, NYSBA co-hosted with the Virgin Islands Bar Association a CLE Program entitled "America Has a Colonies Problem: Constitutional Rights and U.S. Territories." The program examined the constitutional and legal history of U.S. territories and the Insular Cases, as well as legal issues facing U.S. territories in the U.S. Supreme Court and Congress. NYSBA hosted a follow-up program in December 2021, and its Committee on Diversity, Equity, and Inclusion hosted a CLE program, "What Do the Insular Cases, Voter Suppression Efforts and the Anti-CRT Movement Have in Common?" as part of NYSBA's Annual Meeting. These important events help educate lawyers across New York State and beyond about the Insular Cases and their harmful historical and current effects on people across the U.S. territories.

It is well past time that the Insular Cases, the basis for unequal treatment of Valleo-Madero and the people of the U.S. territories, are overturned and their rationales soundly repudiated. Lawyers play an important role in addressing systemic inequality. This includes understanding past and current *de jure* inequities and their continuing implications as CRT helps teach. It calls for educating ourselves and others about historical and current inequality and advocating for the constitutional promise of equal justice under law.

"The Insular Cases 'are contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.'"

Natalie Gomez-Velez is a professor of law at the City University of New York School of Law, where she teaches courses in public institutions/administrative law and constitutional structures, among others. She is the 2022 chair of the Association of American Law Schools Education Law Section and serves on the New York City Bar Education Law Committee. Gomez-Velez also engages in legal commentary, including articles in Jurist.

USI Affinity

We Can't Predict the Future, But We Can Insure It

A Full Suite of Insurance Solutions.
For You, Your Family, and Your Practice.

As the endorsed insurance program of the NYSBA, we offer a complete range of insurance solutions covering all of your business and personal needs, while providing exclusive insurance and benefit solutions not available to the general public.

Business Insurance:

- Lawyers Professional Liability
- Cyber Liability
- EPLI

1.855.USI.0100

Personal Insurance:

- Life & Disability
- Student Loan Refinancing
- Long Term Care
- Auto, Travel, Pet
- Dental & Vision

1.855.874.0141

Call today for more information on the insurance products available to New York State Bar Association members, including a NYSBA professional membership credit.

www.NYSBAInsurance.com

USI AFFINITY

FLY_0547_0122_NYSBA

Placing an Emphasis on the 'S' in ESG

By Meredith Mandell

It's been on the backburner and it is now coming into full force. A number of social factors can affect a company's performance, including short-term and long-term challenges. While much has been written about other aspects of environmental, social and governance activities – for example, a corporation's effects on the planet or its internal political functions – social factors are primarily those that impact people working within the company or people and institutions outside of it.

The Push for Corporate ESG

The corporate focus on ESG activities has been dubbed the "new paradigm for business,"[1] although this value-driven model has been around for decades. For example, the corporate social responsibility movement, a forerunner to ESG,[2] spurred the United States to enact the Comprehensive Anti-Apartheid Act, a 1986 federal law which imposed sanctions and prohibited U.S. nationals from making any new investments in South Africa during the apartheid regime. ESG is sometimes described as a subset of CSR or what others have called the socially responsible investment movement, but ESG is primarily focused on data-driven assessments of a company to predict performance.

For a long time the major focus of ESG activities has been on the environment and climate change. More recently, we see an emerging focus on the "S," or the social component of ESG, including corporate efforts to enhance and advance various forms of social justice for corporate employees, customers and the broader community in which the company operates. There can be a disconnect between what companies say and what they actually do in the ESG arena, which poses challenges for corporate communications with regulators, employees, investors and the public, raises the risks of litigation and heightens the need for litigation defense strategies.

Where Is the Recent Momentum on the "S" Coming From?

In no small measure, ESG was given a huge boost by recent social movements. The 2018 #MeToo anti-sexual harassment movement heightened awareness and actions about how women are treated in corporate America. The 2020 Black Lives Matter movement further shined a spotlight about diversity, equity and inclusion in corporate America, as did the Stop Asian Hate movement. As companies spoke out supporting these social concerns, they also built up expectations for what actions companies would take to advance diversity among employees, board members and other corporate constituents. Similarly, in the realm of human rights and health and worker safety, the COVID-19 pandemic has increased renewed awareness and attention to worker health and safety.[3]

These widespread social concerns did not go unnoticed by corporate regulators. In June of 2021, SEC Chairman Gary Gensler discussed his agency's interest in rule-making related to public company disclosures about "environmental risk" but also on what he dubbed "human capital disclosure."[4] Gensler focused on the SEC's interest in "human capital disclosure," including "a number of metrics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety."[5] In this vein, the Nasdaq Stock Exchange received approval from the SEC to adopt a Board Diversity Rule in August of 2021, a disclosure standard designed to encourage a minimum board diversity objective for companies and provide stakeholders with consistent, comparable disclosures concerning a company's current board com-

position.[6] The Nasdaq rule requires exchange companies to publicly disclose board-level diversity statistics using a standardized template and whether the company has at least two diverse directors and, if not, the reasons why.[7]

Some state governments have passed ESG regulation, with California notably in the lead.[8] New York, Illinois and Maryland have also passed legislation requiring its companies to publish board diversity data in its annual reports.[9]

Institutional investors have played an increasingly large role in pushing ESG forward. As one Forbes magazine commentator put it: "ESG investing is based on the assumption that ESG factors have financial relevance."[10] Arjuna Capital, the second largest institutional investor in Microsoft, recently surprised much of the investing world when it successfully convinced Microsoft shareholders to agree with a proposal to push the software-maker to issue a public report on the effectiveness of its sexual harassment policies.[11] State Street Global Advisors, one of the world's largest asset managers, said that, in 2022, it would vote against compensation committee chairs at S&P 500 companies that are not disclosing their federally mandated EEO-1 report data on workforce diversity.[12]

Another way investors have tried to address institutional racism in corporate America is by putting pressure on corporations to select diverse directors.[13] John Streur, president and CEO of Calvert Research and Management, one of the oldest socially responsible investors, wrote in June 2020, amid the protests over the killing of George Floyd, that "[e]nding racism in America is a responsibility of corporations, and corporations must recognize that their current efforts to promote their core values, and diversity and inclusion programs, fall far short of what is needed today."[14] Larry Fink, the chairman and CEO of BlackRock, which manages $10 trillion in investments and is one of the world's largest asset managers,[15] has repeatedly called on investee companies to appoint at least two women to serve on their board of directors.[16] In the 2019 proxy season, BlackRock revealed that it had voted against board members at 52 companies in the Russell 1000 with boards that included fewer than two women or no other diverse directors.[17] In his 2022 annual letter to CEOs, Fink defended the push for greater transparency of corporate environmental, social and governance practices in policies in what he described as "[s]takeholder capitalism," which he said was "not about politics. It is not a social or ideological agenda. It is not 'woke.' It is *capitalism,* driven by mutually beneficial relationships between you and the employees, customers, suppliers, and the communities your company relies on to prosper."[18]

Another aspect of the "S" in ESG concerns workers' human rights, with supply-chain sourcing as an example of a hot topic. Just recently, President Biden enacted the Uyghur Forced Labor Prevention Act, a new law intended to combat forced labor in China's Xinjiang region where the Uyghur, a Turkish ethnic group, and other Muslim minority populations reside.[19] The new law will take effect on June 21, 2022 and require companies to present strong documentation to the U.S. Customs and Border Protection that no part of their products contain components sourced or manufactured made with forced labor.[20]

High Stakes Litigation Risks

Given the increased scrutiny of corporate diversity and human rights, there are a number of areas where "S" litigation may likely increase. While environmental or "green-washing" shareholder suits have been more suc-

cessful to date than "diversity" lawsuits, that may very well change as the sheer numbers of these suits begin to increase. There have also been some early plaintiffs' successes in the realm of lawsuits attacking "human rights" records and "worker safety" suits that may also serve as models for ESG "social responsibility lawsuits." Further, a number of recent high profile ESG-styled sexual harassment lawsuits against corporate boards have led to notable settlements. And even if some suits did not succeed, the approaches to filing these cases are still in their early iterations, and the current body of case law can illuminate where plaintiffs may strengthen their claims going forward – for example, more recently some plaintiffs have successfully brought false advertising claims alongside securities fraud claims.[21]

Lawsuits Driven by a Lack of Diversity

A lack of gender diversity, tied to allegations of sexual harassment, has spawned ESG-styled shareholder-derivative suits in the area of sexual harassment, with some successful settlements that included board commitments around diversity. In the Wynn Resorts Ltd. derivative action – litigation brought by the New York State Common Retirement Fund and the New York City Employees Retirement System – the settlement included an agreement for Wynn Resorts to split the CEO and chair position, make a stated commitment to 50% board diversity, and use a Rooney Rule to require interviews of diverse candidates. (The Rooney Rule is an NFL policy that requires any team with a head coaching vacancy to interview at least one diverse candidate.[22]) In the same vein, in the wake of shareholder actions led by the state of Oregon arising out of allegations of sexual misconduct at L Brands Inc., the newly spun-off Victoria's Secret corporate board is now composed of nearly all women directors (six out of seven directors) and half of Bath & Body Works Inc.'s independent directors (under the new name of L Brands) are women.[23]

On the other hand, a number of diversity-based actions have failed to proceed past the motion to dismiss stage. In *Ocegueda v. Zuckerberg*,[24] the plaintiff alleged that Facebook lacked diversity at all levels (on its board and executive team and in its workplace), that it engaged in discriminatory advertising practices and failed to curb hate speech in violation of the directors' fiduciary duty and the Securities Exchange Act of 1934.[25] The case was dismissed on several grounds, including that statements regarding diversity in the company's proxy statements were "non-actionable puffery" or "aspirational" and that the complaint lacked plausible facts about directors' misconduct.[26]

Likewise, in April 2021, a case against Gap, Inc., claiming the company failed to create meaningful diversity on the board of directors or with the company's leadership roles and made false statements about its diversity and its efforts to create diversity, was dismissed on procedural grounds for failure to abide by a forum selection clause in the corporation's bylaws.[27] Similar lawsuits against Oracle Corporation, Danaher Corporation and 10 of its 12 directors, and OPKO Health's board, which alleged failure to appoint diverse board members or executives, were also dismissed for failure to plead with specificity or other procedural defects.[28] In spite of these wins on the part of the defendants, there is at least one high-profile suit still pending,[29] and the push by federal and state regulators, along with the intensity of feeling by activists and investors around boards that are viewed as exclusionary, suggest that such lawsuits are not likely to fade away and will continue to be pursued.

Human Rights Issues and Health and Safety Lawsuits

There have been some early successes in the arena of human rights and worker safety. In a recent action against Starbucks Corp.,[30] the plaintiff alleged that, while Starbucks labels its hot chocolate as "made with ethically sourced cocoa," and that the company administers an internal certification program known as "COCOA,"[31] "[n]evertheless, Starbucks is 'fully aware that the farms it sources its cocoa from use child and slave labor.'"[32] The court ultimately denied Starbucks's motion to dismiss and allowed the plaintiff's claims to go forward under California's California Consumers Legal Remedies Act and Unfair Competition Law.[33]

In yet another case, shareholders of Vale S.A., a Brazilian mining company, received a $25 million settlement over claims that Vale and its executives committed securities fraud under Sections 10(b) and 20(a) of the Securities Exchange Act.[34] The court found that the plaintiffs had successfully alleged that defendants materially misrepresented or omitted facts in public filings related to the stability and safety of Vale's projects, and that its statements were not simply "puffery."[35]

In January 2019, the National Consumer League announced a settlement of a lawsuit[36] alleging violation of the District of Columbia's Consumer Protection Procedures Act[37] by defendant-retailers Wal-Mart, The Children's Place and J.C. Penney, for failure to audit company suppliers, as the companies had promised, to ensure safe and healthy working conditions for their workers and not utilize child labor. Also in the area of health and safety, in November 2019, California Attorney General Rob Bonta announced a stipulated judgment requiring Amazon to end harmful labor practices that concealed COVID-19 case numbers from workers and to provide key information on workplace protections.[38] As part of the stipulated judgment, Amazon modified its COVID-

19 notifications to workers and local health agencies, agreed to submit to monitoring regarding its COVID-19 notifications and paid a $500,000 fine.

What Lies Ahead?

Various arms of federal and state governments, activist shareholders and institutional investors are increasingly jumping into the fray of greater ESG oversight and regulation.

In litigation, we see that many of the lawsuits filed have been shareholder derivative actions involving federal securities fraud claims, as well as other statutory and regulatory claims premised on such issues as false advertising and consumer protection. While expressions of corporate optimism and puffery may not be actionable fraudulent statements, there is a fine line between puffery and ESG-related disclosures that are materially misleading or false. Specific vulnerabilities have included disclosures or lack of disclosures related to corporate audits and statements made in press releases or on websites, statements made to employees.

While some commentators have suggested that workforce diversity and board diversity litigation is floundering given the spate of recent losses in a number of high-profile cases are not convinced that is the case given the push by the federal government and its agencies toward increased scrutiny and regulation. The more that data and disclosures become publicly available, the greater possibility that a plaintiff will be able to meet requisite pleading standards.

Particularly in the "S" area of ESG, we are seeing an increased concern and use of litigation about "human rights" causes, which has largely covered worker health, safety and anti-exploitation measures. Given the operational and reputational risks at stake, there is a need to take steps to manage pre-litigation risks. Companies should review what they say against what they actually do, scrutinizing both involuntary and voluntary disclosures at all levels – whether in advertising or period reports filed with government agencies or statements to employee – to make sure corporate actions and words are aligned. As one example, a company should consider adding language into their supply chain vendor contracts that expressly states ESG goals, expectations and metrics for compliance. These contracts should also expressly warn vendors that they may be terminated should they fail to adhere to these expectations. Enforcement, of course, must be monitored. Seeking third-party certification of ESG compliance is not without its own litigation

risk: activists have sued both those who use certifications and the certifiers.

Overall, we believe that ESG litigation will slowly grow in force and impact, making these risk management activities all the more critical.

Meredith Mandell is an associate in Quinn Emanuel's New York office. Her practice focuses on complex commercial litigation. Prior to joining the firm, Mandell worked as a judicial law clerk in the Southern District of New York. Before practicing law, Mandell was a legal affairs producer at a national television news network and was also a prize-winning journalist.

Endnotes

1. *See* Camilla Christino, *ESG: The New Paradigm for Business*, Timeline Soft Expert Blog, Nov. 29, 2021, https://blog.softexpert.com/en/esg-timeline.

2. Generally speaking, commentators have described ESG and CSR as related concepts in that they are "both concerned with a company's impact on society and the environment," but different in that CSR is a "business model used by individual companies," whereas "ESG is a criteria that investors use to assess a company and determine if they are worth investing in." James Cook, *What Is the Difference Between ESG and CSR*, Business Leader, Sept. 2, 2021, https://www.businessleader.co.uk/what-is-the-difference-between-esg-and-csr; *see also*, George Kell, *The Remarkable Rise of ESG*, Forbes, July 11, 2018, https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#575351571695 (describing data-driven nature of ESG when compared to SRI).

3. For example, Amazon.com Inc. had to apologize in 2021 for falsely denying that its employees were at times forced to urinate in plastic bottles because they did not have adequate time to use the restroom. *See* Audrey Conklin, *Amazon aware that workers allegedly pee in water bottles, documents show; company pushes back*, FoxBusiness.com, Jan. 28, 2021, https://www.foxbusiness.com/technology/amazon-workers-pee-water-bottles. Amazon's full-time warehouse employee injury rate was more than 60% higher than non-Amazon warehouse employee injury rate and twice as high as Walmart warehouse employee injury rate. Niall McCarthy, *Amazon Warehouse Injuries Significantly Higher Than Competitors*, Forbes.com, June 8, 2021, https://www.forbes.com/sites/niallmccarthy/2021/06/08/amazon-warehouse-injuries-significantly-higher-than-competitors-infographic.

4. *See* SEC Chairman Gary Gensler, Prepared Remarks at London City Week, SEC, June 23, 2021, https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321.

5. *Id. See also* SEC Staff Legal Bulletin No. 14L SEC, Nov. 3, 2021, https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals. In the bulletin, the SEC rescinded previous guidance on shareholder proposals and revised the standards for the ordinary business exception in Rule 14a-8(i)(7) and the economic relevance section of Rule 14a-8(i)(5) to limit the ability of corporations to exclude ESG proposals by shareholders from the proxy-voting process, paving the way for an increased number of "S" shareholder proposals in the coming year.

6. NASDAQ's Board Diversity Rule: What NASDAQ-Listed Companies Should Know, Oct. 21, 2021, https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf.

7. *Id.*

8. California has requirements about women on public company boards and directors from underrepresented communities. *See* Cal. Corp. Code §§ 301.3, 2115.5; Cal. Corp. Code § 301.3(A)–(B); Cal. Corp. Code § 301.3(E)(1).

9. *See* 805 Ill. Comp. Stat. Ann. 5/8.12 (requires companies to publish data regarding female, minority and LGBTQ directors); N.Y. Bus. Corp. Law § 408 (requiring corporation's biennial statement to disclose the total number of directors and the total number of female directors and requiring that the state prepare a study from this data looking at the change in board gender composition from prior years and the aggregate percentage of women directors on all boards); Md. Code Ann., Tax-Prop. § 11-101(c) (requiring that domestic stock corporations with total sales exceeding $5,000,000 and tax-exempt domestic nonstock corporations with operating budgets exceeding $5,000,000 must comply with a gender diversity reporting requirement to state's Department of Assessments and Taxation).

10. Kell, *supra* note 2.

11. Jordan Novet, *Microsoft Hires Law Firm To Review Sexual Harassment Policies, With Report Due in Spring*, CNBC.com, Jan. 13, 2022, https://www.cnbc.com/2022/01/13/microsoft-hires-law-firm-to-review-sexual-harassment-policies.html.

12. Guidance on Enhancing Racial & Ethnic Diversity Disclosures, State Street Global Advisors (Jan. 2021), https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf.

13. This is an example of how the "S" or social aspect of ESG blends and overlaps with the corporate governance side or the "G" in ESG. Notably, while this article is focused on "S" there is some inevitable overlap between "S" and "G."

14. John Streur, *Corporations and Investors Must Do More to Combat Racism*, Calvert Impact Blog, June 2, 2020.

15. Andrew Ross Sorkin and Michael J. de la Merced, *It's Not 'Woke' for Businesses to Think Beyond Profit, BlackRock Chief Says*, N.Y. Times, Jan. 17, 2022, https://www.nytimes.com/2022/01/17/business/dealbook/larry-fink-blackrock-letter.html.

16. *See, e.g.,* Vanessa Fuhrmans, *How To Get More Women in the Boardroom? Some Try Blunt Force*, Wall Street J., April 25, 2018, https://www.wsj.com/articles/how-to-get-more-women-in-the-boardroom-some-try-blunt-force-1524648602.

17. BlackRock Investment Stewardship 2019 Annual Report, BlackRock (Aug. 2019), https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2019.pdf.

18. Larry Fink's 2022 Letter to CEOs: The Power of Capitalism, BlackRock, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

19. Lydia Beyoud, *U.S. Crackdown on Forced China Labor Risks Supply Chains Snarls*, Bloomberg, Jan. 27, 2022, https://news.bloomberglaw.com/esg/china-forced-labor-law-risks-snarling-supply-chains-esg-goals.

20. *Id.*

21. *See, e.g., infra* note 30.

22. *See, e.g.,* Press Release regarding Wynn Resorts, Ltd. Derivative Litigation (Aug. 2, 2021) (announcing $90 million settlement of derivative suit rising out of allegations that Steve Wynn engaged in a longstanding pattern of sexually harassing and assaulting Wynn employees on company property), https://www.cohenmilstein.com/case-study/wynn-resorts-ltd-derivative-litigation.

23. *See* Kevin LaCroix, The D&O Diary, Aug. 2, 2021, https://www.dandodiary.com/2021/08/articles/director-and-officer-liability/l-brands-establishes-90-million-fund-in-sexual-misconduct-derivative-suit-settlement (noting that L Brands agreed to a settlement of litigation arising from sexual misconduct allegations which will require it to adopt management and governance measures, to which it will commit $90 million of funding over the course of five years).

24. 526 F. Supp. 3d 637 (N.D. Cal. 2021).

25. *Id.* at 641. Specifically plaintiffs file claims under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9.

26. *Id*. at 651–52.

27. *Lee v. Fisher*, 2021 WL 1659842 at *6 (N.D. Cal. Apr. 27, 2021).

28. *See Klein v. Ellison*, 2021 WL2075591 (N.D. Cal. May 24, 2021); *In re Danaher Corp. S'holder Derivative Litig*., 2021 WL 2652367 (D.D.C. June 28, 2021); *Lee v. Frost*, WL 3912651 (S.D. Fla. Sept. 1, 2021).

29. *See Foote v. Micron Tech., Inc.*, No. 1:21-cv-00169 (D. Del. Feb. 9, 2021) (motion to dismiss still pending involving shareholder derivative complaint filed against Micron Technology asserting claims for breach of fiduciary duties – good faith, loyalty, reasonable inquiry, oversight, and supervision – unjust enrichment, waste of corporate assets, abuse of control, gross management, and violation of § 14(a) of the Securities Exchange Act and SEC Rule 14a-9, arising from allegations regarding Micron's lack of diversity, equality and inclusion and false statements on diversity).

30. *Myers v. Starbucks Corp*., 536 F. Supp. 3d 657 (C.D. Cal. 2021).

31. *Id.* at 662.

32. *Id.*

33. *Id*. at 667.

34. *In re Vale S.A. Sec. Litig*., 2020 WL 2610979 (E.D.N.Y. May 20, 2020).

35. *Id*. at *1.

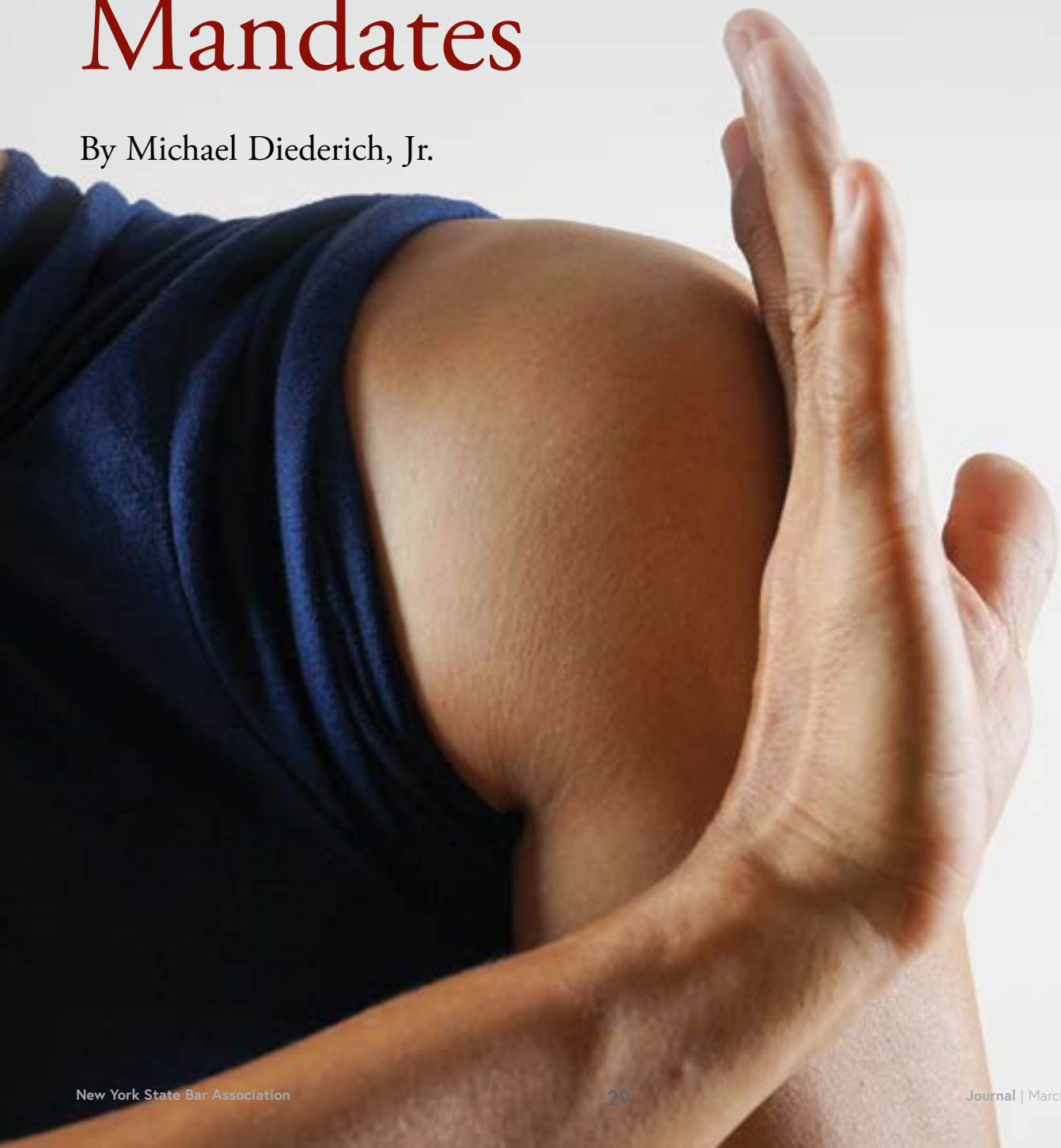
36. *See* Statement on resolution of lawsuit against Walmart, JC Penney, and The Children's Place, National Consumers League, https://nclnet.org/archive-pages/resolution_walmart; *see also Nat'l Consumers League v. Walmart Stores, Inc*., No. 2016 CA 007731 B, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016). The settlement was struck after a court partially denied the defendant-retailers motion to dismiss.

37. *Id*. at *10–11.

38. *See In Nationwide First, Attorney General Bonta Secures Judgment Requiring Amazon to Comply with "Right-to-Know" Law to Help Protect Workers Against Covid-19*, California Attorney General's Office Press Release, Nov. 15, 2019, https://oag.ca.gov/news/press-releases/nationwide-first-attorney-general-bonta-secures-judgment-requiring-amazon-comply.

The Ethics of Advocating Against COVID Vaccine Mandates

By Michael Diederich, Jr.



A famous professional athlete,[1] unvaccinated against COVID-19, arrives at your law office seeking representation relating to his opposition to any vaccination. He has (hypothetically) been turned down for a tennis coaching job at a tennis academy in Queens. He wishes to prove his point that he is entitled to work in his chosen field, without a mask and unvaccinated. Earlier the same day, a New York City public schoolteacher has come to the law office seeking legal review of her letter of resignation, because she is being forced to resign or get vaccinated.

This article addresses some moral and legal ethics issues relating to potentially representing the sports star and the schoolteacher, as well as issues concerning the law office staff. It focuses on the ethical and moral questions relating to lawyers representing, and employing, people who oppose governmental mandates such as vaccination against COVID-19 (COVID[2]).

The COVID pandemic has created many legal, moral and ethical dilemmas, both for individuals and for society as a whole. Lawyers may ask themselves: Is it moral and professionally ethical to advocate for a client when the legal right sought – for example, the right not to be vaccinated – might very well result in the client's severe physical illness or death? What if the potential result is severe physical illness or death for one or more of the client's relatives, friends, workplace colleagues or anyone in physical proximity?

A Deadly Virus

There is no doubt that COVID kills. But it does not kill with 33% (one in three) lethality of the Middle East Respiratory Syndrome (MERS)[3] or the 30% lethality of the now-eradicated smallpox virus. The lethality of COVID is much lower, at least so far. COVID-19 (pre-omicron) has a lethality of around 0.3% for the general population (already killing about 1% of America's over-65 population).[4] One million deaths in an American population of over 300 million is not an insignificant figure. Most Americans recognize this and, accordingly, Americans both individually and collectively have taken steps to protect against COVID-caused illness and death in the following ways:

1. Individuals have taken protective measures for themselves and their families through vaccination, protective masks, social distancing, isolation and testing;
2. Employers (private and governmental) have required of their employees some or all of the same, and
3. Government at various levels (federal, state and local) have imposed various constraints on people's liberty, e.g., temporary business closures, mandatory social distancing and protective mask-wearing, required vaccination to enter public spaces, and entry restrictions and quarantines.

From almost the start of the pandemic, there has been public debate as to the need for some or all of the above measures. This debate has changed over time as the virus mutated and as health experts learn more about the virus and its variants. For example, there is the possibility that omicron will become endemic but manageable, eventually allowing life to return to normal. In the abstract, almost everyone agrees that there must be a balancing between the government's power to constrain individual liberty for the sake of public safety and the individual's right to be free from unnecessary governmental compulsion. However, the balancing has become politically polarized, making individual, employer and governmental decision-making difficult.[5] Assessing the science, the statistics and one's soul are relevant to assessing the morality and ethics of our behavior.

Morality

Is disregard of vaccination mandates and protective masks akin to jaywalking or drunk driving? Americans disagree in their perceptions about COVID's dangerousness, particularly with the new omicron variant. Yet as to the original COVID-19 virus and its delta variant, it cannot be credibly disputed that adults who refuse to mitigate viral spread (e.g., by not wearing a sufficiently protective mask in public[6]) and who refuse to be vaccinated are acting in a manner that places the safety of others (and themselves) at risk.

Is it moral to place others at risk of death? Well, every time we drive over the speed limit in a car, we are placing others at increased risk. Speed limits are set to save lives. So when does it become immoral to place others at increased risk? It's a judgment call. When does violating a governmental mandate designed to protect the general public become a moral violation? At what point does trivial disregard become morally repugnant dereliction? Speed limits, stop signs and seatbelt requirements may be viewed as annoyances by some, but all should agree that driving twice the speed limit on a city street while drunk is a moral dereliction (not to mention a felony).

This is not a philosophy paper, yet most should agree that when the cost of compliance to an individual is small, and the benefit to others (and, collectively, to society) is large, the moral thing to do is to comply. As to COVID, because the cost to individuals in wearing protective masks, social distancing and getting vaccinated is objectively small, and the benefit to others (and also one's self) in avoiding serious illness and death is large, the moral thing to do is to get vaccinated and, especially if in a region where COVID transmission is raging, to wear an adequately protective mask when in public. The

moral equation may change with the passage of time – for example, if omicron becomes endemic and no worse than the common cold for vaccinated individuals. The "precautionary principle" of environmental law may be the best guide: if a certain activity may have tremendously harmful consequences, it is prudent to control the activity rather than to wait for further scientific evidence.[7]

Moreover, scientific statistics and human perception of risk are two very different things. The risk that a virus will do harm is much less obvious than that of a reckless or drunk automobile driver. Yet this should not change the moral equation. During the past 12 months of the COVID pandemic, there have been many more people who have died of COVID-19 than have died from accidental deaths (automobile, fire, etc.).[8] When the reckless or drunk driver kills someone, it is a moral outrage and crime. Yet when a person dies of COVID-19 because he and those around him were unvaccinated, it is a tragedy without moral or criminal implication. We can readily see that the reckless or drunk driver proximately caused an accident victim's death, whereas the proof of causation between an unvaccinated person's interactions with others and someone's death will be rare indeed.

If a person recklessly spreads COVID (for example, by coughing in a public setting without a mask if they know or reasonably suspect that they have COVID), are they any less morally culpable for serious illness or death than the drunk driver? People fail to see this moral equivalency and moral dereliction.

The reason is lack of awareness. There is not an obvious connection between drinking with a group of people at a bar while spreading a deadly virus (not even realizing you are sick) and seeing a connection to reckless driving. Awareness of risk is perhaps why the vast majority of people respects and complies with traffic rules and regulations, whereas a large percentage of Americans rejects COVID-protection measures. Many Americans rejected vaccination even as news reports showed hospital ICU beds filling up with unvaccinated delta variant victims. Society's conduct has not changed much with the rapid spread of omicron. Many Americans still seem indifferent, even as hospital medical personnel became exhausted, ICU beds scarce and blood supplies in perilously short supply, all of this imperiling responsibly vaccinated people in need of non-COVID-related hospital care.[9]

Much of the law is based upon moral values, and COVID has created moral challenges. The balance of this article will discuss the some of the challenges COVID poses for professional ethics.[10]

COVID and Professional Ethics

Morality aside, whether and when a person can legitimately claim a lawful exemption from COVID mandates, and the lawyer's role in advocating for such, is an important ethical discussion for the legal profession, as it affects our conduct toward our potential clients, retained clients, professional colleagues and office staff.

"If a person recklessly spreads COVID (for example, by coughing in a public setting without a mask if they know or reasonably suspect that they have COVID), are they any less morally culpable for serious illness or death than the drunk driver?"

Potential Clients

There can be no doubt that some people have sincere, heartfelt fears about vaccination, and sometimes legitimate fear. As mentioned in the introduction, a high school teacher came to the author's law office asking for the legal review of her letter of resignation based upon her refusal to be immunized. She is immunocompromised. Her physician advised her to get the COVID-19 vaccine, but her medical specialist said it was "up to her" (as, of course, it was). She was afraid of the vaccine. We gave her legal advice protecting her legal rights. But as "lay" advice, we urged her to get immunized (and urged her to ask her specialist what he would do if in her shoes). She seemed to be a very sincere yet very misguided person. Her risk of death due to her age and immune-compromised condition was greatly increased absent immunization.[11] We did our job as a law office. We gave

sound legal advice. We discussed the possibility that she might have a potential legal claim as a union member. Our non-legal advice was gratuitous, perhaps,[12] and in any event fell on deaf ears.

A lawyer's job is to represent clients who feel unlawfully aggrieved or who need (or feel they need) a defense to the actions of others. Even murderers are entitled to a defense, and so are people who feel they need a defense against governmental actors' or employers' perceived infringement upon their civil liberties.

Many people have contacted our law office in connection with COVID vaccine mandates affecting their employment. Most, if not all, have a sincere aversion to being vaccinated against COVID. In our office, one attorney's (the author's) personal view is that almost everyone should be vaccinated against COVID, whereas another of our attorneys views this as a matter of liberty and personal choice. Thus, the first ethical question is whether we can permissibly undertake the representation or whether an attorney's possible hostility toward people who choose not to vaccinate precludes this.

A lawyer or law firm can represent an individual notwithstanding personal disagreement or, if there is written informed consent to do so,[13] "differing interests."[14] For example, an attorney may have a disdain, generally, for people who decline to do what he or she believes to be the socially responsible thing. Most criminal defense attorneys disdain crime. ACLU attorneys do not embrace neo-Nazism.[15] Yet the criminal defense attorney's job, and civil rights lawyer's job is to lawfully help the client – the person in need. Helping a person who is fearful of a vaccine, even if irrationally so, does not imply that the attorney personally condones the choice not to get vaccinated. Rather, it is to help the client who has such fear. The attorney's help can include seeking a reasonable accommodation, a leave of absence or union support for the client's job interests. As long as the lawyer and firm believe they can adequately and competently handle the case[16] they can, but with some COVID caveats. The lawyer must obtain written informed consent from the client[17] if the attorney has personal interest that may result in "a significant risk that the lawyer's professional judgment . . . will be adversely affected by the lawyer's . . . personal interests,"[18] or any conflicting representation.[19] Thus, if the lawyer finds a client's COVID-related case too unsympathetic or personally offensive, a colleague should handle the case. The attorney should also be aware that any conflict of interest is imputed to the entire firm.[20]

The next ethical question, which should arise at or shortly after the initial consultation, is whether there is a bona fide legal claim to pursue.[21] It is unethical for the lawyer to file a frivolous lawsuit,[22] which filing might be separately sanctioned by the court under its rules of procedure.[23] The lawyer cannot accept a client if he or she reasonably should know that the client wishes to "bring a legal action . . . or assert a position [or take steps] in a matter . . . merely for the purpose of maliciously injuring any person . . . . "[24] The lawyer has an obligation to "reasonably consult with the client" as to how the client's "objectives are to be accomplished."[25]

Some law firms may suggest to the client that merely threatening the employer might obtain a beneficial result, with a colorfully worded demand letter and a lot of puff, smoke and mirrors. The lawyer writing such a letter must, however, be cognizant of impermissible purposes and be aware that even conduct unrelated to litigation can result in professional discipline. For example, it is unethical for an attorney to intentionally lie, as Rule 4.1 states: "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person, and likewise cannot misrepresent facts or the law to a tribunal (and must correct false statements)."[26]

If, as a result of the initial consultation, the law firm determines that there is no good faith legal claim, and that the only likely way of getting the client's desired outcome is to put forth falsehoods, the firm should decline the representation. Especially in COVID-related matters, the lawyer must be sure to "consult with the client about any relevant limitation on the lawyer's conduct," as must be done if the lawyer learns that the client "expects assistance not permitted by [the Rules of Professional Responsibility] or other law."[27]

Retained Clients

Let's say your firm takes on a vaccine-hesitant client whose employment is in peril or who has been fired. The lawyer's job is to fully and competently represent the interests of the client within the bounds of the law. A key concept is "lawfully." The attorney can provide a tremendous service to a sincere client, especially one who is willing to listen.

If the unvaccinated client's employment has not been terminated, the lawyer can seek to negotiate an accommodation with the employer; for example, allowing work at a socially distanced location in the office, allowing work from home, or allowing a leave of absence. Obtaining a "reprieve" for your vaccine-hesitant client could result in saving the client's career. With the passage of time, the client might eventually conclude that the benefits of vaccination outweigh the client's perceived risks.

The lawyer may see plausible legal claims worth pursuing, and as such seeks redress from the employer or from a governmental agency,[28] and if this fails, from a court. Hopefully, your client will prevail.

However, if it becomes clear during the course of litigation that a claim has no factual basis, it must be with-

drawn as meritless (frivolous). If your entire case has evolved to a point where it has become clear that no bona fide claims can be established at trial, the lawyer must recommend to the client that the lawsuit be discontinued.[29] If the client refuses to authorize this, the attorney should withdraw from the case,[30] and if the court does not allow withdrawal, the lawyer is precluded from introducing false evidence at trial, such as what the lawyer reasonably expects will be perjured testimony.[31]

The above may be particularly relevant in COVID litigation, and not necessarily because of malice or mischief on the part of the client, but rather because some clients' perception of the vaccine is so frightening, indeed, overwhelmingly so. The fear is so great that they may allege anything they think "may stick" – e.g., religious objection, medication intolerance or psychological impairment. Discovery may reveal that one or more of the assertions is not true or was not made in good faith. As to the law, the court might dismiss your client's lawsuit on such basis.

There are bona fide and viable legal protections that an attorney can assert to protect a vaccine hesitant client, with some federal statutes mentioned next.

The ADA

Under the Americans with Disabilities Act,[32] and parallel New York State and New York City law, an employer must engage in an interactive dialogue with a client who has a COVID-related impairment or perceived impairment to see whether a requested accommodation can be made.

The FMLA

If an illness, rather than a disability, is involved, an employee may have protection under the Family Medical Leave Act.[33] For example, a person or covered family member becoming ill with COVID or related illness may be entitled to up to 12 weeks medical leave under the FMLA.

Title VII – Religious Discrimination

Title VII of the Civil Rights Act of 1964 protects employees against discrimination based upon their religious beliefs. This is a fertile ground for both fair and frivolous claims. If a person holds a sincerely held religious belief preventing vaccination, that triggers the need for an interactive dialogue with the employer regarding possible reasonable accommodation.

NLRB and "Decisional and Effects Bargaining"

Under the National Labor Relations Act, as well as corresponding state law, employers have the legal duty to bargain in good faith as to conditions of work and mandatory subjects of bargaining.[34] Mandatory workplace masking and COVID vaccinations are certainly subjects requiring discussion.

Professional Colleagues

We live in a politically polarized nation, and many aspects of the COVID pandemic have become "hot button" issues. With this in mind, it is particularly important that all lawyers maintain our professionalism and respect norms of professional courtesy and civility. This certainly includes respecting the COVID policies of offices you visit. Lawyers also can play a role in changing people's minds regarding vaccine hesitancy.

In a forthcoming paper entitled "Vaccine Hesitancy and Legal Ethics,"[35] the two authors describe their view of the role that legal ethics can play in advancing public health and safety, including helping to counter vaccine hesitancy. Essentially, their article reiterates the lawyer's duty not to knowingly spread disinformation about vaccines and the virus. They also propose "alternative avenues for aligning legal ethics with public health,"[36] such as:

- requiring vaccine passports for court appearances,
- incorporating public health concerns into the Comments accompanying Rules of Professional Responsibility,
- countering vaccine disinformation through continuing legal education, and
- encouraging third-party advocacy.

Lawyers, as officers of the court, are a part of the third branch of government. We are a profession of rules and, when necessary, we should be advocates for better rules to help avoid societal chaos. Beyond the moral duties discussed at the beginning of this article, in this time of COVID we have a moral duty (and sometimes an ethical duty) to advance the public interest, including public health and safety.

Thus, absent good cause, lawyers have a moral duty not only to be vaccinated against COVID (and other deadly diseases), but also to educate ourselves about immunizations (that they are safe) and certainly to not intentionally spread falsehoods about vaccination. Vaccine hesitancy based upon disinformation is causing thousands of deaths.[37] We have a moral duty to protect those around us – clients, staff and everyone else. Some lawyers have very close contact with COVID-vulnerable clients (e.g. the elderly, disabled, prisoners) and thus may have – like health care workers – heightened moral (and perhaps ethically aspirational) obligations of beneficence and non-maleficence.[38] Moreover, as discussed at length in a report by the New York City Bar Association's Professional Ethics Committee, an unvaccinated lawyer may be inclined, out of personal fear, to avoid such clients by refusing to attend required court appearances, breaching professional obligations such as diligence and avoidance

of conflicts of interest in the process.[39] Avoiding necessary steps to advance the client's interest may breach the duty of competence.[40] Less egregiously, an attorney may perhaps avoid providing pro bono representation (an aspirational ethics violations[41]). Thus, non-vaccination could impair the lawyer's diligence,[42] fitness[43] or ability to represent the client, requiring withdrawal.[44]

Particularly applicable to COVID misinformation and disinformation, under Rule 8.4, it is ethical misconduct for a lawyer to:

> (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice . . . . [45]

Whether alleging facts regarding COVID or presidential election results, there may be professional consequences for lying. For his false statements, including to the courts and the "public at large," former New York City Mayor Rudy Giuliani's New York law license has been suspended in connection with his dishonesty about President Trump's 2020 election loss.[46]

A powerful argument has been made by W. Bradley Wendel of Cornell Law School that lawyers (regardless of their political leanings) must remain true to the "fundamental normative commitments of legal ethics," which include "defending legal rules, procedures, and institutions against gross manipulation in the service of some political end," which means "respect for law and facts."[47] Attorneys (such as the author) may take cases to advance "justice" and "the public interest," yet justice and the public interest may be in the eye of the beholder.

Wendel argues that buttressing the truth in support of the law is the most important value in legal ethics, as a normative matter. He gives as an example former Attorney General William Barr who bluntly characterized President Trump's theories of election fraud as "bullshit,"[48] and quotes another attorney who wrote: "Precisely because good lawyers couldn't fathom Trump's false claims of fraud, Trump was left with what Barr aptly called a 'clown show' of a legal effort . . . . "[49] In other words, as to the 2020 election, lawyers demanding actual evidence helped save our democracy, at least for the time being.

For Wendel, lawyers upholding the law based upon truth has a "stabilizing effect" that is one of the "central theoretical pillars of legal ethics."[50] Whether pandemics or politics, facts matter and should especially matter to lawyers. Even in a "post-truth era," courts are "among the rare fora where statements must still be supported by evidence-based, verifiable facts."[51]

Office Staff

Last, but certainly not least, is the law firm's office staff. As an employer, the moral guidelines, law and ethical rules discussed above must not be ignored. If an employee has a medical or religious objection to vaccination, engage in the interactive process required by law and see if a reasonable accommodation is possible, as this will likely be best for all concerned. Keep in mind that it is professional misconduct for a lawyer to unlawfully discriminate, including "determining conditions of employment on the basis of . . . creed . . . [or] disability . . . . "[52]

Conclusion

Whether the superstar athlete or a schoolteacher seeks legal representation to avoid governmental or employer COVID mandates, the lawyer must be cognizant of the applicable ethics rules. There is much an attorney can do to protect the vaccine hesitant. But what the attorney must not do is ignore rules requiring good faith advocacy based upon facts. "Know when to fold them," if a mandate-avoidant client has not been honest with you, the lawyer. A lawyer can legitimately fight to assert an honest client's religious- or disability-connected right not to be vaccinated. At the same time, there is nothing wrong in mentioning to a vaccine-hesitant client or potential client that vaccines are safe, effective and protective of others.

Michael Diederich, Jr. is a solo practitioner in Rockland County who represents individuals in civil rights and employment law matters. He is a retired U.S. Army "JAG" lawyer and served on active duty tours in Germany, Iraq and Afghanistan. He is a member of NYSBA's Committee on Civil Rights.

Endnotes

1. The athlete could be Novak Djokovic. *See* Damien Cave, *When Tennis Became a Stage for Right and Wrong During a Pandemic*, N.Y. Times, Jan. 14, 2022, https://www.nytimes.com/2022/01/14/world/australia/novak-djokovic-australian-open.html.

2. "COVID," as used in this article, means the SARS-CoV-2 virus and its recent variants, including delta and omicron. "COVID-19" will refer to the original COVID disease and the delta variant.

3. Gina Kolata and Benjamin Mueller, *Halting Progress and Happy Accidents: How mRNA Vaccines Were Made*, N.Y. Times, Jan. 15, 2022, https://www.nytimes.com/2022/01/15/health/mrna-vaccine.html.

4. Julie Bosman, Amy Harmon and Albert Sun, *As U.S. Nears 800,000 Virus Deaths, 1 of Every 100 Older Americans Has Perished*, N.Y. Times, Dec. 13, 2021, https://www.nytimes.com/2021/12/13/us/covid-deaths-elderly-americans.html.

5. Mary Scouten, *The Intersection of Partisan Affiliation, Political Polarization, and COVID-19 Pandemic Response*, NYSBA Health Law Journal, Vol. 26, No. 3 (2021).

6. With the new omicron variant, best is an N-95 or KN-95 mask.

7. *Principles of Environmental Law*, Encyclopedia Britannica (2022), https://www.britannica.com/topic/environmental-law/Principles-of-environmental-law.

8. *See* Center for Disease Control & Prevention (CDC) website, https://www.cdc.gov/nchs/fastats/accidental-injury.htm (40,698 motor vehicle deaths, and 200,995 total accidental deaths in 2020).

9. *See, Jennifer Rubin, Americans Should Be Learning To 'Live' With COVID-19. The Unvaccinated Are Making That Impossible,* Wash. Post, Dec. 30, 2021, https://www.washingtonpost.com/opinions/2021/12/30/americans-should-be-learning-live-with-COVID-19-unvaccinated-are-making-that-impossible.

10. New York Rules of Professional Conduct (RPC), 22 N.Y.C.R.R. Part 1200.

11. Dorry Segev and William Werbel, *Omicron Isn't Milder for Everyone, Like Our Patients*, N.Y. Times, Jan. 13, 2022, https://www.nytimes.com/2022/01/13/opinion/omicron-immunocompromised.html.

12. *Cf.* N.Y.S. RPC, Rule 2.1 ("a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may . . . [refer] to other considerations such as moral . . . factors that may be relevant to the client's situation.").

13. *See* N.Y.S. Appellate Division's Rules of Professional Responsibility, 22 N.Y.C.R.R. Part 1200, Rule 1.7(a)(1) & (b)(4) (requirement for written consent if representing "differing interests").

14. *See* N.Y.S. Appellate Division's Rules of Professional Responsibility, 22 N.Y.C.R.R. Part 1200, Rule 1.0(j), defining "differing interests").

15. E.g., *ACLU History: Taking a Stand for Free Speech in Skokie*, https://www.aclu.org/other/aclu-history-taking-stand-free-speech-skokie (neo-Nazi representation).

16. *See* N.Y.S. Appellate Division's Rules of Professional Responsibility, 22 N.Y.C.R.R. Part 1200, Rules 1.1 (competence) and Rule 1.2 (diligence).

17. Rules of Prof'l Responsibility, Rule 1.7(b)(4).

18. Rules of Prof'l Responsibility, Rule 1.7(a)(2).

19. Rules of Prof'l Responsibility, Rule 1.7(a)(1).

20. Rules of Prof'l Responsibility, Rule 1.11(a).

21. Rules of Prof'l Responsibility, Rule 1.16(a)(2).

22. Rules of Prof'l Responsibility, and Rule 3.1 (non-meritorious claims and contentions).

23. E.g., FRCP Rule 11.

24. Rules of Prof'l Responsibility, Rule 1.16(a)(1).

25. Rules of Prof'l Responsibility, Rule 1.4(a)(2).

26. Rules of Prof'l Responsibility, Rule 3.1.

27. Rules of Prof'l Responsibility, Rule 1.4(a)(5).

28. E.g., the N.Y.S. Division of Human Rights, N.Y.C. Commission on Civil Rights, the U.S. EEOC, the U.S. Department of Labor or the NLRB.

29. Rules of Prof'l Responsibility, Rule 1.15(b).

30. *Id.*

31. Rules of Prof'l Responsibility, Rule 3.3(a)(3).

32. 42 U.S.C. ch. 126, § 12101 *et seq.*, incorporating the ADA Amendments Act of 2008.

33. *See* 29 U.S.C. § 2601 *et seq.*

34. NLRA §§ 8(d) & 8(a)(5); *see also* https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative.

35. Noelle Wyman & Sam Heavenrich, *Vaccine Hesitancy and Legal Ethics*, Georgetown Journal of Legal Ethics (2021, forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958592.

36. *Id.*

37. *Id.* at 3; *see also* RPC Rule 4.1 (lawyer shall not knowingly make a false statement).

38. To benefit others, and avoid harming others, respectively. *Id.*, at 6–8.

39. N.Y.C. Bar Comm'n on Pro. Ethics, Formal Op. 2020-5, at 4 (2020), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2020-5-a-lawyers-ethical-obligations-when-required-to-return-to-court-in-person-during-a-public-health-crisis.

40. *Id.*, citing NYSBA Ethics Op. 1053 (2015).

41. RPC, Rules 6.1 & 6.5.

42. RPC, Rule 1.3.

43. RPC, Rule 8.4(h).

44. RPC, Rule 1.16(b)(2).

45. RPC, Rule 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.").

46. *See also* Renee Knake Jefferson, *Lawyer Lies and Political Speech*, Yale Law Journal Forum, Vol. 131 (2021–2022), https://www.yalelawjournal.org/forum/lawyer-lies-and-political-speech.

47. W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, Yale L. Journal Forum, Oct. 24 2021, https://www.yalelawjournal.org/forum/pluralism-polarization-and-the-common-good-the-possibility-of-modus-vivendi-legal-ethics.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Lawyer Lies and Political Speech*, *supra* note 47, at Point III.

52. RPC, Rule 8.4(g).

The Economic Case Against Forced Disclosure of Third Party Litigation Funding

By Keith Sharfman

"How did you pay for that?" has always been an inappropriate question in American social life. Whether the inquiry is about the purchase of a house, a car, jewelry, an education or almost anything else, reasonably fair-minded people do not feel compelled to answer such a question and, in so doing, compromise their financial privacy. Why should a curious questioner be entitled to know whether you paid for something yourself out of income or savings, or if instead you purchased it on credit or with borrowed funds, or if instead you received the item as a gift from a friend or a relative? So long as the money used to make a purchase wasn't stolen, how the purchase was funded is nobody's business.

Until recently, this basic norm of financial privacy was as true for the purchase of legal services as it was for anything else. No one (and certainly not adversaries in a civil suit) used to think that they had the right to know how a party obtained the funding to finance its case. Whether litigation is funded with a party's own funds, or with borrowed funds, or by means of a contingent or alternative fee structure agreed to by the party's attorneys was never the concern of anyone other than the client and its attorneys.

Financial privacy is not protected, of course, when party finances directly bear on litigation outcomes, such as in bankruptcy and family law litigation where party financial disclosures are necessary and routine. But in the vast majority of cases, where litigation funding is legally irrelevant to case outcomes, preserving party financial privacy has always been the norm.

Generally speaking, the last thing a party wants an adversary to know is that it cannot afford to prosecute or defend its case or that its case is not strong enough to attract much much, if any, external funding. Adversaries who know this information can try to use it to win not on the merits, as the legal system intends, but instead through a battle of attrition.

While it might well interest an adversary strategically to know how (and how well) cases are funded, the law never entitled an adversary to know. Just as the law does not entitle an employer, when negotiating a salary with a prospective employee, to know how badly the job seeker needs the job, so too, for reasons of strategic fairness that go beyond simply an interest in financial privacy, the law did not in the past grant parties any mandatory access to information about an adversary's sources of funding. When litigating or negotiating a settlement, parties could rest assured that their adversaries would not have access to strategically compromising information concerning how the cases against them were funded.

All of this has changed, however, with the passage in a handful of jurisdictions (most recently in the Federal District of New Jersey) of procedural rules mandating the disclosure of third party litigation funding.[1] Under these unprecedented new rules, parties must now disclose the nature and extent of any third party funding that their cases receive.

The same rule change mandating the disclosure of nonparty litigation funding has been proposed in other jurisdictions such as Wisconsin, where it was adopted,[2] and Texas, where it has failed to pass.[3] In New York, no such rule or legislation has been proposed, but the New York City Bar Association's Working Group on Litigation Funding has studied the issue and recommended against mandatory financial disclosure.[4]

Surprisingly, the Institute for Legal Reform (ILR) at the U.S. Chamber of Commerce (which usually favors free markets and opposes intrusive policy mandates and overbroad regulations that interfere with industry's ability to engage in private market transactions) has lobbied heavily in favor of these new forced disclosure rules. The ILR's website has gone so far as to describe "[f]ighting against the expansion of the multibillion [dollar] Third Party Litigation Funding (TPLF) industry here in the U.S. and globally" as one of its goals.[5] Though it is itself an industry, litigation finance is singled out by the ILR, perhaps because some influential members of the chamber are opposed to all litigation of any sort however meritorious it may be.

While on its website the ILR is candid about its goal to curtail litigation finance, the ILR's public filings are framed more high-mindedly. In a recent filing with the New Jersey courts, the ILR offered a number of ostensible policy justifications for forced disclosure.[6] These included: (1) "to ensure compliance with ethical obligations" relating to "conflict[s] of interest," "appearances of impropriety," and "inappropriate fee sharing"; (2) to "satisfy defendants' entitlement to know their accusers"; (3) to "allow both courts and defendants to more accurately evaluate settlement prospects and to better calibrate settlement initiatives" such as requiring litigation funders "to attend . . . mediation"; (4) to "give courts necessary information to assess who actually controls a civil action"; and (5) to "enable courts to determine whether funding arrangements are running afoul of state-law prohibitions against champerty."

Even a cursory review of these justifications, however, finds them seriously deficient:

1. **Ethics.** The ethics rules that the ILR invokes are designed to protect clients from their lawyers, not to protect parties from their adversaries' financiers. If there is an ethical concern about attorneys' fee structures or their arrangements with litigation funders, it is appropriate for their clients but not for their adversaries to complain. The problem of attorney ethics and conflicts is more than adequately met by Rule 7.1 and other extant Rules of Professional Conduct; additional disclosure targeted at litigation funders would not improve attorney ethics but rather would merely benefit the funded parties' adversaries.

2. **Confrontation of Accusers.** It is the clients themselves and not those who fund them who are the actual accusers. Defendants have no right to confront funders. There is no basis for confronting litigation funders in law or in history prior to the recent legal assault against litigation finance. The ILR seeks to portray financed parties as Goliaths rather than Davids. But what's relevant for factfinders is whether these parties were Davids at the time of the alleged wrongdoing that is the subject of dispute, not whether they have obtained a Goliath level of funding to pursue litigation after the fact. And besides,

litigation should always be about the merits themselves, not about which side is better funded or whether one side or the other seems more Goliath- or David-like.

3. **Settlement Prospects.** It is doubtlessly true that any party in litigation would appreciate the opportunity to better "evaluate settlement prospects" and "calibrate settlement initiatives." But since when has this ever been a legal entitlement? Never before has the law adopted procedural rules with an intention to strengthen the hand of one party so that it can settle more favorably with the other. Procedural rules are supposed to enhance the legal system's ability to adjudicate disputes on the merits, not to tilt outcomes in one direction or another.

4. **Control of the Case.** When a court finds that ethical misconduct may have occurred in a particular case, it is indeed sometimes necessary for the judge to learn who is really in control of the case. But an inquiry as to control is justified only in such narrow circumstances and not as a blanket rule mandating disclosure in all cases, including the vast majority where no ethical impropriety ever occurs or is even alleged. Consider also that we have professional rules to govern attorneys, and we rely on attorneys to sign pleadings and implicitly vouch for the accuracy of the statements they contain. The rules do not presume dishonesty. Just as it would not be appropriate to audit all taxpayers but rather only those whose filings raise a reasonable suspicion of illegality, we should not presumptively investigate litigation financing in all cases but rather only in the rare case where circumstances suggest to a neutral judge a specific area of ethical concern.

5. **Champerty.** Champerty is an ancient doctrine that made it a crime for a third party to support someone else's litigation. The doctrine has been abandoned in most jurisdictions, including New Jersey. But even for those jurisdictions where champerty remains forbidden in some form or another, the proper approach is to investigate in specific cases where champerty is suspected or alleged in good faith, not to cast about widely with mandatory disclosures burdening all litigants and their funders across the board.

But the ILR's non-merits-based objections to privacy for litigation finance are, in truth, a distraction. For the case against forced disclosure of litigation finance goes far beyond demonstrating that disclosure is both unprecedented and unnecessary to police against the harms that such financing allegedly enables. Further analysis from an economic perspective shows that maintaining the privacy of litigation finance is economically efficient and actually beneficial from a social welfare perspective.

Economists and policymakers have long recognized the general economic value of financial privacy.[7] Consumers and other economic actors are often willing to pay for financial privacy, and policymakers routinely seek to protect it. The policy debate on financial privacy has always been about whether to allow the waiver of it and not about whether to require its relinquishment. And what is true for financial privacy as a general matter is even more true when it comes to financial privacy with respect to litigation finance.

Litigation finance information is of particular strategic value. The extent and nature of a party's litigation funding can affect the strength with which a case may credibly be pursued or settled.[8] Why should the law entitle adversaries to have access to this information and enable them to draw inferences from it about the strength of their opponents' cases and about the vigor with which their opponents are equipped to pursue their claims? Why should an adversary get to know how funders regard the claims they fund and, implicitly, how they value other claims that they do not fund?

Litigation funders invest time, effort and other resources to research the value of the claims they fund. This is socially valuable activity, as it enables meritorious claims to be vindicated that otherwise would lack the funding to go forward.[9] Compelling litigation funders to share the results of their research with their litigation opponents and/or other competitors through mandated disclosures of their case selections and fee arrangements diminishes the value of this research and funding activity and dampens the incentive to engage in it.

The same analysis holds true for any socially valuable research performed by any firm in any industry. Imagine if pharmaceutical firms had to disclose to each other the nature and extent of the funding that they devote to their research projects. Competitors could then use these disclosures to their own advantage, and the incentive for any firm to develop new drugs would thereby be diminished. In economics, this obvious problem is referred to as "free riding" – a principle that animates the law's protection of trade secrets and other intellectual property and one that is well understood and accepted by policymakers when regulating industry.[10] Litigation funders face the same risks of free riding as other innovators and thus ought also to enjoy the same legal protections.

Beyond the problem of free riding in cases where litigation funding is available, forced disclosure of litigation finance also destroys value when litigation finance is lacking. Opposing parties in litigation can draw an adverse inference about the value of a case from the absence of external litigation finance. This problem has not been sufficiently appreciated until now in the policy debate, because unfunded claims lack a natural advocate to lobby on their behalf in the policy arena.

The problem of adverse inferences is well known in economics generally and as applied specifically to civil litigation.[11] Consider by way of example two types of anti-theft systems for automobiles. One involves a device that rests atop a car's steering wheel and is visible to pro-

spective car thieves. The other is a hidden system that silently messages police when a car is stolen. Suppose that the two devices protect the cars in which they are installed equally well. But what effect do these devices have on other cars that are not equipped with an anti-theft device?

The visible device affords no protection to other cars and, indeed, may harmfully encourage car thieves to focus their efforts on cars that lack visible protection. The hidden device, by contrast, protects not only the car in which it is installed but also other cars that, from an external observer's point of view, might have the hidden device – even if they do not.[12]

Now consider a world in which the hidden anti-theft device is banned by regulators. In such a world, prospective car thieves peering through a car window will know that if no anti-theft device is visible, the car is unprotected. When concealment of anti-theft devices is banned, the prospective car thief can draw an adverse inference from the absence of a visible device. Crooks would, of course, benefit from knowing whether an intended victim has a security system. But obviously, the law should not give them the right to know.

Similar economic analysis applies (albeit more controversially) in the case of concealed carry gun laws. Violent crime is lower in jurisdictions that allow legal gun owners to carry concealed weapons because the legal possibility of a concealed weapon deters violence even against people who are not necessarily carrying a weapon but who (from a potential attacker's perspective) simply might be.[13] Here too, concealment is socially beneficial (excluding from the analysis the possible negative effects that permitting concealed weapons may have on gun accidents, a factor that is possibly present only in the gun but not in the litigation finance context).

Litigation finance privacy has salutary economic properties that are analogous to those of concealed weapons and hidden anti-theft devices in automobiles. The concealment of potential litigation finance makes it much harder for well-funded civil litigants to take advantage of poorly funded civil litigants through the adoption of hardball litigation tactics based on adverse inferences about the case from its lack of external funding. As with hidden anti-theft devices and concealed carry gun laws, the possibility and permissibility of concealed litigation funding protects against harmful, opportunistic conduct by adversaries and is protective even in cases when concealment is not present. And when concealment is legally unavailable, adversaries may harmfully draw adverse inferences as to a lack of protection.

Forced disclosure of litigation finance denies financial privacy to civil litigants and thereby diminishes their litigation prospects. Economic analysis shows how this is true even for litigants who do not avail themselves of financing. Preserving financial privacy for litigants protects not only parties whose cases attract external litigation finance, but also (and perhaps even more importantly) those whose cases do not.

Economics teaches us that the law should not be used to attack litigation finance privacy but rather to protect it. This would allow judges and juries to decide cases on the merits rather than on the basis of how cases are funded. Asking parties how they paid for their cases is not merely rude. Requiring them to answer is economically wasteful and socially harmful.

Keith Sharfman is professor of law and director of bankruptcy studies at St. John's University School of Law, where he teaches courses in law, economics and finance.

Endnotes

1. Local Rule 7.1.1 of the U.S. District of New Jersey.

2. *See* 2017 Wisconsin Act 235 § 12 (requiring litigation parties to disclose any agreement entitling someone other than party attorneys to receive compensation that is contingent on proceeds from a civil action).

3. https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB1567 (visited Feb. 9, 2022).

4. New York City Bar Association Working Group on Litigation Funding, Report to the President 72–73, Feb. 28, 2020, documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf.

5. https://www.uschamber.com/program/institute-for-legal-reform (visited Feb. 6, 2022).

6. *See* Letter of Harold Kim & Anthony Anastasio re: Proposed Local Civil Rule 7.1.1. – Disclosure of Third-Party Litigation Funding (D.N.J.), May 21, 2021.

7. Jeffrey M. Lacker, *The Economics of Financial Privacy: To Opt out or Opt in*, Federal Reserve Bank of Richmond Economic Quarterly 1–16 (2002). On the value of privacy in the context of litigation and settlement, *see generally* Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 Yale Law Journal 1885 (2000).

8. Richard A. Posner, Economic Analysis of Law § 22.12 (9th ed. 2014); Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 Journal of Legal Studies 1 (1996).

9. Ronen Perry, *Crowdfunding Civil Justice*, 59 Boston College Law Review 1357 (2018); James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 Journal of Law, Economics, & Organization 349 (1993).

10. *See, e.g.,* Richard A. Posner, Economic Analysis of Law 363 (9th ed. 2014); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 Antitrust Law Journal 473 (2007); Laurie L. Hill, *The Race to Patent the Genome: Free Riders, Holdups, and the Future of Medical Breakthroughs*, 11 Texas Intellectual Property Law Journal 221 (2003); Daniel B. Ofstedal, *Eliminating Truckers' Free Ride Through Trademark Control*, 13 Journal of Corporation Law 621 (1988); Victor P. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 Northwestern University Law Review 736 (1984).

11. Abraham L. Wickelgren, *A Right to Silence for Civil Defendants?,* 26 Journal of Law, Economics, & Organization 92 (2008); Kathryn E. Spier, *Incomplete Contracts and Signalling*, 23 Rand Journal of Economics 432 (1992); cf. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game Theoretic Analysis of the Fifth Amendment Privilege*, 114 Harvard Law Review 430, 487 (2000).

12. Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities From Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Quarterly Journal of Economics 43 (1998) (demonstrating empirically how the hidden anti-theft system Lojack benefits other car owners who do not possess the Lojack system).

13. John R. Lott, Jr., More Guns, Less Crime: Understanding Crime and Gun-Control Laws (University of Chicago Press, 3d ed., 2010) (documenting empirically how laws permitting gun owners to carry concealed weapons reduce the incidence of murder and other violent crimes though they may also increase gun accidents).

Hitting 'Send' May a Settlement Make: An Analysis of *Philadelphia Insurance Indem. Co. v. Kendall*

By Steven M. Bierman and Gaëlle E. Tribié

Litigators, like all lawyers, routinely utilize emails to communicate with opposing counsel on the full range of matters that may arise in a lawsuit. In this, the third decade of the 21st century, the notion of typed, signed and mailed physical correspondence is a fading memory, if a memory at all, for most practitioners in most circumstances. What, then, is the consequence of counsel exchanging emails with agreed settlement terms when the emails contain at most an automatically pre-populated "signature" block but no deliberate retyping of the attorney's name akin to a "signature"? Would an exchange of such emails constitute an enforceable settlement in accord with the requirement of Rule 2104 of the New York Civil Practice Law and Rules that a binding agreement in a case must be "subscribed" by counsel or the parties, if not made in open court or reduced to an order?

Notably, the New York Court of Appeals has not yet addressed whether emails satisfy the subscription requirement of CPLR 2104 for purposes of a binding settlement, but courts of the Appellate Division, First and Second departments have considered the question and, until recently, were in accord in their approach. However, the First Department recently announced a departure from its prior precedent, and that of the Second Department, in *Philadelphia Ins. Indem. Co. v. Kendall*,[1] an opinion authored by Justice Peter H. Moulton for a four-member panel.[2] In *Philadelphia Insurance*, the First Department clarified that the fact of the transmission of an email, and not whether it displays an email "signature," is what determines that a settlement stipulation has been subscribed for purposes of CPLR 2104. The decision highlights yet another reason for care, forethought and intentionality by counsel when hitting "send" for an email in the course of litigation.

The "Subscription" Requirement of CPLR 2104

Under New York law, a settlement must comply with CPLR 2104, which provides in pertinent part:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.

In the absence of a settlement agreement made in open court or reduced to the form of an order and entered, New York courts have strictly interpreted the requirement that the agreement be in writing and "subscribed" by the party or counsel. Although the New York Court of Appeals has yet to address the issue, courts of the Appellate Division have held over the years that email communications between counsel can constitute a binding settlement, where counsel physically subscribed or typed their name into the email.[3] In particular, in *Forcelli v. Gelco Corp.*, the Second Department held that

> where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature ["Thanks Brenda Greene" typed at the end of the email], such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement.[4]

The First Department's recent decision in *Philadelphia Insurance* marked a departure from that court's earlier agreement with the Second Department's approach in *Forcelli*, and signaled instead that the key to whether an agreement is subscribed for purposes of CPLR 2104 in the case of email is the fact of the transmission and not whether counsel retyped her or his name.

The *Philadelphia Insurance* Decision

The Dispute: Timing Is Everything

The First Department's analysis stemmed from an automobile accident in 2014 involving respondent Erika Kendall and non-party Khalilah T. Martin. Kendall was driving her employer's car during the collision. Martin's automobile liability insurance policy limits were lower than those in the insurance policy held by Kendall's employer, issued by the petitioner-appellant in the case, Philadelphia Insurance Indemnity Company. Kendall settled her personal injury claim against Martin for $25,000 (the maximum amount under Martin's policy), and then made a claim under the Supplementary Underinsured Motorist benefit provision in the employer's automobile policy with Philadelphia Insurance.[5] Kendall and Philadelphia Insurance arbitrated their dispute in August 2019 before the American Arbitration Association.

The parties engaged in settlement discussions prior to, during and after the arbitration hearing. On Sept. 16, 2019, the arbitrator issued her decision and awarded Kendall $975,000. Although the arbitrator's decision was emailed to Kendall's attorneys and faxed to Philadelphia Insurance's attorneys, neither counsel received the decision. Instead, they continued settlement negotiations, agreeing to a settlement of $400,000 on Sept. 19, 2019. To memorialize the agreement, Kendall's counsel emailed Philadelphia Insurance's counsel stating: "Confirmed – we are settled for 400K." The email was signed "Sincerely," and followed by Kendall's email signature block with counsel's name and contact information. That same day, Philadelphia Insurance's counsel responded and attached a release and trust agreement and stated: "Get it signed quickly before any decision comes in, wouldn't want your

client reneging." Kendall's counsel replied: "Thank you. Will try to get her in asap." This was again followed by "Sincerely," and the counsel's email signature block.

Before signing the release and trust agreement, Kendall's counsel, meanwhile, received the arbitrator's decision and demanded payment of the amount awarded, $975,000, and declined the $400,000 settlement amount. Philadelphia Insurance initiated special proceedings in the New York Supreme Court for New York County seeking enforcement of the settlement agreement and vacatur of the arbitration award.

The "Subscription" Requirement: What Really Matters

The First Department noted that although the Court of Appeals has not opined on whether emails can satisfy CPLR 2104, in 1996 the court found in *Parma Tile Mosaic & Marble Co. v. Estate of Short* that a fax message with a prepopulated name did not satisfy CPLR 2104.[8] The First Department concluded that this 25-year-old authority was not controlling, because "the *Parma* court wrote in a different era, when paper records were still an important modality . . . . Since that time, the electronic storage of records has become the norm, email has become ubiquitous, and statutes allowing for electronic signatures have become widespread."[9]

"Counsel engaging in settlement discussions by email must carefully consider their language and the consequences of hitting 'send.'"

The motion court (Hon. Lynn R. Kotler, J.) rejected Philadelphia Insurance's petition and denied enforcement of the settlement agreement, finding that failure to sign the release was a necessary occurrence to complete the settlement and that the email sent by Kendall's counsel was not "sufficient to satisfy CPLR 2104 as it does not appear to be subscribed . . . nor does it contain all the material terms of a settlement agreement between the parties[.]"[6] Relying on the Second Department's *Forcelli* analysis, which indeed was at that time consistent with the First Department's own precedent, the Supreme Court reasoned that (i) the emails were "followed by prepopulated text" and, therefore, they were not subscribed by Kendall's attorney; and (ii) "the only term the parties seemed to agree upon was a sum of money" and the email from Philadelphia Insurance's counsel evidenced that further things were needed to finalize the settlement and "an understanding that the settlement may not be binding."[7]

Philadelphia Insurance appealed the trial court's rejection of the settlement agreement. The First Department held that the email exchange constituted an enforceable settlement under CPLR 2104, and thereupon reversed the Supreme Court's decision and directed that the insurer's petition to enforce the settlement and to vacate the arbitral award be granted.

The First Department addressed head-on the Second Department's *Forcelli*, holding that emails between counsel could constitute a binding settlement agreement under CPLR 2104 where the attorney's name was retyped, and the court noted that "cases have found that an email in which a party's or its attorney's name is prepopulated in the email is not sufficiently subscribed for purposes of CPLR 2104[.]"[10]

The First Department acknowledged that the motion court's finding that the retyping of a name was required for an email to be "subscribed" was "in accord with precedent of this Court." Reversing the motion court, the First Department took the opportunity to "write to clarify that the transmission of an email, and not whether an email 'signature' can be shown to be retyped, is what determines that a settlement stipulation has been subscribed for purposes of CPLR 2104," finding that the email communications at issue satisfied CPLR 2104. The court declared, "We now hold that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a

settlement via email, but rather the fact that the email was sent."[11]

The court also considered whether the email "signature" complied with § 304(2) of New York's Electronic Signatures and Records Act, which provides that "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."[12] The court looked to the statutory definition of "electronic signature," which it found to be "extremely broad": "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record."[13]

Finally, the court considered the ethical obligations of attorneys under New York's Rules of Professional Conduct and was persuaded that these "obligations help to ensure that an attorney considers their authority before communicating settlement offers and acceptances to opponents, whatever the mode of communication."[14]

For these reasons, the First Department concluded that "if an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature."[15]

The Email Still Must Satisfy the Material Terms Requirement

The First Department made clear that "[w]hile we jettison the requirement that a party or a lawyer retype their name in email to show subscription, that does not mean that every email purporting to settle a dispute will be unassailable evidence of a binding settlement[,]" reminding in particular that "an email settlement must, like all enforceable settlements, set forth all material terms."[16] The court found this requirement was satisfied because counsel's email set forth "the sum of money" that the insurer would pay Kendall, the only material term, and Kendall's execution of a general release was just further documentation of the agreement and "a ministerial condition precedent to payment[.]"[17]

Be Sure Before Hitting "Send" and Know What "Send" May Mean

In *Philadelphia Insurance*, the First Department has taken a pragmatic approach to the application of CPLR 2104 to settlement agreements made by emails. The court looked to the parties' intent – as evidenced through their counsel's conduct rather than a formulaic prescription – to find a binding settlement. With changes in technology come changes in practice and practical consequences. Counsel engaging in settlement discussions by email must carefully consider their language and the consequences of hitting "send."

Steven M. Bierman is an independent mediator, arbitrator, and dispute resolution advisor, and founder of Bierman ADR. He is a fellow of the Chartered Institute of Arbitrators, and accredited as a mediator by the Centre for Effective Dispute Resolution. He also serves on multiple ADR rosters. Bierman previously was a partner at Sidley Austin, where he headed or co-headed the New York Litigation Group for 25 years and was co-leader of its global commercial litigation and disputes practice.

Gaëlle Tribié practices in the litigation group in the Sidley Austin New York office. Her practice focuses on international commercial arbitration disputes, complex commercial litigation matters, and enforcement matters involving U.S. agencies.

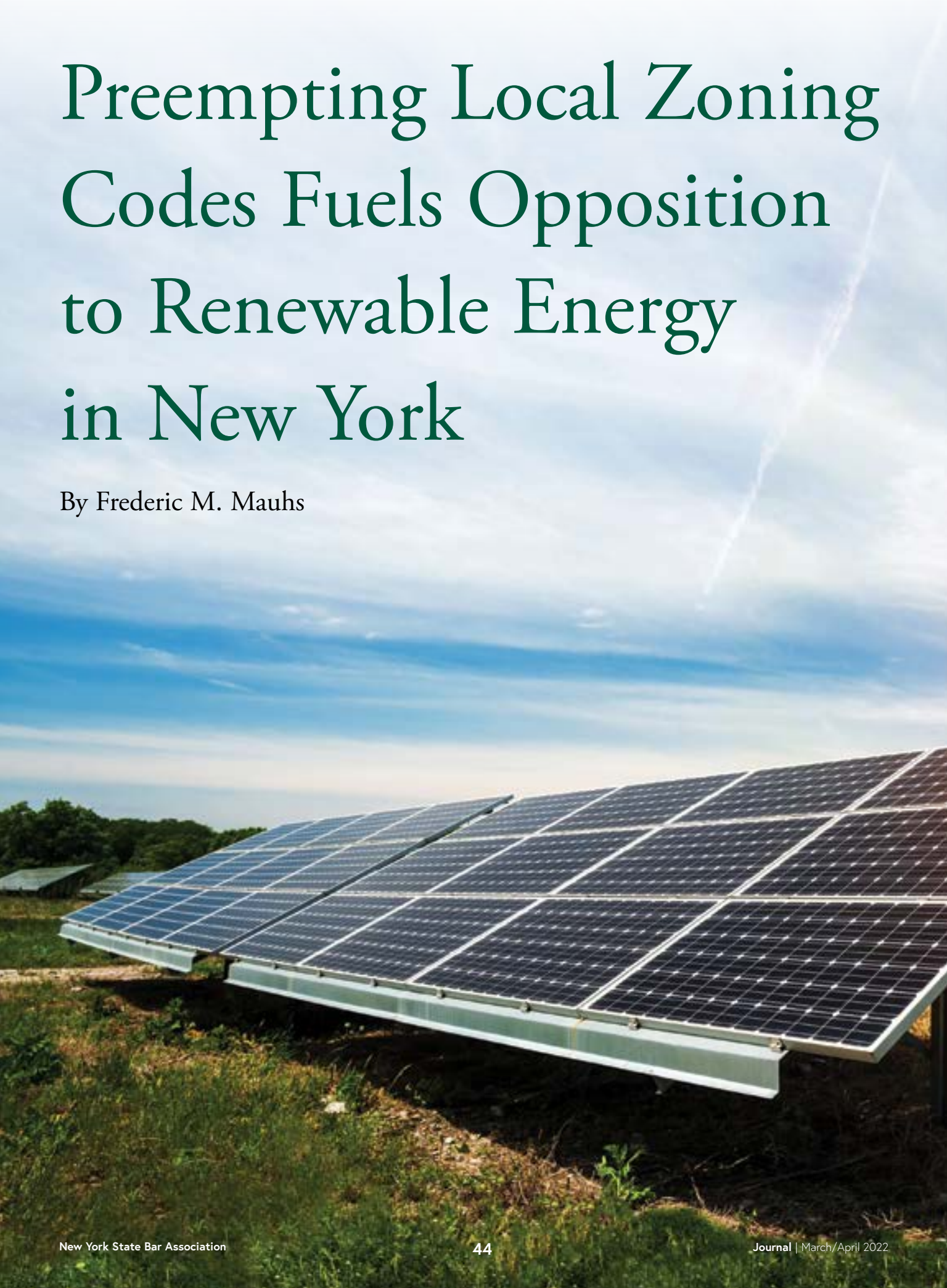
This article appears in a forthcoming issue of New York Dispute Resolution Lawyer, the publication of NYSBA's Dispute Resolution Section. For more information on this section, go to to NYSBA.ORG/DISPUTE.

Endnotes

1. 197 A.D.3d 75 (1st Dep't 2021).
2. Presiding Justice Rolando T. Acosta, Justice Sallie Manzanet-Daniels and Justice Saliann Scarpulla concurred.
3. *See, e.g., Herz v. Transamerica Life Ins. Co.*, 172 A.D.3d 1336, 1336–38 (2d Dep't 2019) ("Here, the emails were subscribed by counsel, set forth the material terms of the agreement—the acceptance by the plaintiff's counsel of an offer in the sum of $12,500 to settle the case in exchange for a release in favor of Transamerica—and contained an expression of mutual assent"); *Forcelli v. Gelco Corp.*, 109 A.D.3d 244, 250 (2d Dep't 2013); *Williamson v. Delsener*, 59 A.D.3d 291, 291 (1st Dep't 2009) ("The e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds . . . and entitle plaintiff to judgment") (citation omitted).
4. *Forcelli,* 109 A.D.3d at 251.
5. *Kendall*, 197 A.D.3d at 76.
6. *Philadelphia Ins. Indem. Co v. Kendall*, No. 657200/19, 2020 WL 2842551, at *1 (Sup. Ct., N.Y. Co. May 27, 2020) (citations omitted).
7. *Id.* at *1–2; *see also Forcelli*, 109 A.D.3d 244.; *Jimenez v. Yanne*, 152 A.D.3d 434 (1st Dep't 2017).
8. *See Kendall*, 197 A.D.3d at 78 (citing *Parma Tile Mosaic & Marble Co. v. Estate of Short*, 87 N.Y.2d 524 (1996)).
9. *Id.*
10. *Id*. at 396 (citing *Bayerische Landesbank v. 45 John St. LLC*, 102 A.D.3d 587 (1st Dep't 2013), *lv. dismissed*, 22 N.Y.3d 926 (2013) and *LIF Indus., Inc. v. Fuller*, 2015 WL 1744814, at *6 (Sup. Ct., N.Y. Co. Apr. 16, 2015)).
11. *Id.*
12. ESRA § 304(2).
13. N.Y. State Tech. Law § 302.
14. *See Kendall*, 151 N.Y.S.3d at 80 (citing New York's Rules of Professional Conduct (22 N.Y.C.R.R. § 1200.0) Rule 1.2(a) and Rule 1.4(a)(iii)).
15. *Id.*
16. *Id.* at 81.
17. *Id.* ("respondent's execution of a general release was essentially a ministerial condition precedent to payment").

Preempting Local Zoning Codes Fuels Opposition to Renewable Energy in New York

By Frederic M. Mauhs



By now, many New Yorkers are aware that their state has adopted ambitious plans to lead the nation in the fight against climate change and global warming. The objectives established for New York's electric grid in the Climate Leadership and Community Protection Act[1] – to increase renewably generated electricity to 70% of total in-state production by 2030 and generate 100% emissions-free electricity by 2040 – are now entering our vernacular as the "70 x 30" and "100 x 40" goals, as stated in the Draft Scoping Plan and the Natural Resources Defense Council website.

Perhaps less well understood, however, is the enormity of the effort it will take to achieve these goals. The New York Independent System Operator estimates that 39,262 megawatts (MW) in nameplate capacity[2] must be sourced from grid-connected solar, as opposed to behind-the-meter solar (such as residential rooftop panels), to meet the 100 x 40 goal.[3] To put 39,262 MW into perspective, consider that the largest operating solar facility in New York State is the Long Island Solar Farm, a 32 MW nameplate capacity facility[4] that consumes 200 acres of land. If NYISO's prediction is correct, then the equivalent of 1,227 more Long Island Solar Farms will need to be constructed in New York by 2040. This is in addition to the 35,200 MW capacity that New York's onshore wind farms will need to furnish.[5]

However, the burden of hosting renewables facilities, especially solar farms, will not be distributed evenly throughout the state. Rather, they will be concentrated in those areas where it is easiest and least expensive for energy companies to build. This means that developers will choose sites where population density and land prices are low, the ground is level, the soil contains no rocks or roots, and transmission lines are close – typically within two miles. These also happen to be the very places where New York's prime agricultural soils are located. In other words, the necessary solar and wind farms might well end up on New York's most valuable farmland, in particular the areas encircling the Adirondacks, the horizontal belt just south of Lake Ontario from Buffalo to the Capital District, and the Hudson Valley between Albany and Poughkeepsie.[6]

Between 2011 and 2020, the process of permitting all "major" (over 25 MW) power facilities in New York, including renewable facilities, was governed by Public Service Law Article 10 and presided over by the New York State Board on Electric Generation Siting and the Environment.[7] In 2020, however, the Legislature passed a new law governing the siting of wind and solar facilities only, containing provisions to "streamline" their siting process and accelerate their build-out, called the Accelerated Renewable Energy Growth and Community Benefit Act.[8] This act contains the "Major Renewable Energy Development Program," codified in a new Section 94-c in New York's Executive Law.[9]

The new siting law requires that developers of major wind and solar projects obtain a permit from the Office of Renewable Energy Siting, which resides in the Department of State.[10] As before, "major" is defined as projects with a nameplate capacity of 25 MW or more.[11] Smaller projects will still be governed by local siting procedures. Projects of 20-25 MW capacity may elect to opt out of local law and into the Section 94-c process.[12]

The Office of Renewable Energy Siting promulgated regulations under Section 94-c on March 3, 2021.[13] The industry is closely watching the process to determine whether the new law will facilitate wind and solar farms in the numbers and with the speed required to achieve the law's goals.[14] Many renewable energy supporters have high hopes for the new law, claiming that the prior law was too solicitous of local opposition to get the job done.[15] However, most of the streamlining provisions of 94-c already existed in Article 10. These include a one-year time-limit for each siting proceeding,[16] preemption of environmental review[17] under the State Environmental Quality Review Act (SEQRA)[18] and preemption of local laws, mainly municipal zoning codes, considered "unreasonably burdensome" for siting a project.[19]

The latter preemption is the most significant and controversial of all these provisions in both Article 10 and Section 94-c. When invoked, it denies towns and villages the land use authority granted them under enabling statutes almost 100 years old.[20] This power is reflected in the state constitutional authority for local governments to regulate matters pertaining to "[t]he government, protection, order, conduct, safety, health and well-being of persons and property therein,"[21] and thwarts expectations that local matters can be decided locally. [22]

"Unfortunately, the significance of the siting board's preemption of local zoning ordinances is not well understood by many commentators on New York's renewables siting laws."

It is true, however, that Article 10's record for siting renewable energy facilities was for many years abysmal, despite its provisions for preempting local laws and SEQRA.[23] By 2019, five wind farm developers had withdrawn their applications from the siting board due to local opposition,[24] and no solar project had yet been approved.[25] In February of that year, the discovery of an empty eagle's nest near another proposed wind project pending before the siting board focused local opposition and led to withdrawal of that application, too.

The debacle became the subject of a New York Times article that questioned whether the law's goals were at all achievable given the difficulty in siting renewable energy facilities.[26] Notably, after the article was published, the Article 10 process improved suddenly and became dramatically more effective. The Article 10 Siting Board began approving both wind and solar projects of considerable size[27] in quick succession, overruling virtually all local objections. Between Aug. 20, 2019, and March 11, 2021, eight wind and four solar projects were approved. No application in this time frame was rejected.

In three of the four solar cases, involving projects in the towns of Coeymans,[28] Florida[29] and Sharon,[30] intervenors unsuccessfully objected to the projects on the grounds that the developers had not sufficiently considered alternative siting locations that might have resulted in reduced environmental harm. Alternatives analysis is an important part of normal environmental assessments, such as those required under SEQRA[31] and (with respect to federal agency action) the National Environmental Policy Act.[32] However, both Article 10 and Section 94-c exempt energy projects from compliance with SEQRA.[33] In Article 10's own, more cursory environmental impact regulations, developers are still required to analyze the environmental impacts of alternative siting possibilities, but a private developer need not consider alternative locations on land in which it has no legal interest: "[A] private facility applicant may limit its identification and description to sites owned by, or under option to, such private facility applicant or its affiliates."[34]

In the Coeymans case, the siting board narrowed the Article 10 alternatives assessment requirement even further. In that case, the New York Department of Agriculture and Markets had objected to the siting proposal because 86% of the solar arrays would cover prime agricultural soils[35] as defined in its land classification system – far in excess of AGM's recommended 10% limit.[36] AGM argued that the developer's affiliates had obtained leases on several other properties nearby. Therefore, it contended, the developer was required under Article 10's regulations to undertake an alternatives analysis to determine, for example, if less prime soil would be sacrificed in those other locations. The siting board, however, disagreed because, "although [the developer's] affiliates have other sites under their control, those sites are all slated for development of other solar facilities, and are not available alternative locations for the [proposed] Facility."

In the Florida and Sharon cases, the proposed solar projects violated provisions of the towns' zoning codes: 11 provisions[37] of the Florida code, including setback provi-

sions for solar installations,[38] and the Sharon code's limitations on converting agricultural land and clearcutting forested land.[39] Both towns argued that the respective developers should have analyzed alternative sites for their projects that would not have violated the zoning codes. The siting board in both cases rejected the argument with little or no discussion of the issue,[40] resulting in the preemption of the relevant zoning code provisions.[41]

Unfortunately, the significance of the siting board's preemption of local zoning ordinances is not well understood by many commentators on New York's renewables siting laws. Many renewable energy proponents insist that the siting board and the Office of Renewable Energy Siting would respect a responsibly drafted, renewables-friendly zoning code, and would not preempt it. But Article 10 does not explicitly give the siting board, and Section 94-c does not explicitly give ORES, the authority to require a developer to relocate its project to land it does not own or lease.[42]

Indeed, although both siting authorities have the ability and even the obligation to consider zoning code provisions on how to site a solar facility, neither has the explicit ability to consider zoning code provisions on where to site it.[43] The developer decides the location. The siting laws require the developer only to mitigate environmental harms to the extent possible on whatever land it proposes to build the facility. Both Article 10 and Section 94-c state that the "unreasonably burdensome" test for preempting local law relates only to the facility as proposed,[44] not to the local zoning law itself. Section 94-c could have explicitly made responsible zoning codes relevant to the siting decision had it stated: "[ORES] may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that *such local law* is unreasonably burdensome to achieving the CLCPA targets." Instead, the process makes local law and knowledge about where best to site the facilities irrelevant.

To be sure, Section 94-c contains many provisions that should speed the permitting process even faster than Article 10 did. For example, if any case before ORES is not decided within 12 months, it is deemed automatically approved.[45] The regulations under Section 94-c also contain a set of default "uniform standards and conditions"[46] for mitigating environmental harm so that the developer and the community need not spend time negotiating them, as under Article 10. But perhaps the most important factor in accelerating the process will be the political establishment's expectation that ORES will use its discretion to move toward positive siting decisions more expeditiously than the siting board and with even less respect for local laws.[47] In other words, ORES will be under an enormous reputational burden to prove itself more capable of avoiding delays and less deterred by local opposition.

ORES, as well as the energy companies themselves, would be well advised to respect rural communities' legitimate land use concerns, regardless of the local law preemption provision of Section 94-c. Past failures to protect politically powerless communities from having to host a disproportionate share of New York's fossil fuel-driven power plants led belatedly to a recognition that those communities were victims of a grave environmental injustice. ORES should therefore muster the political will to respect local zoning codes that provide ample opportunity for the siting of utility-scale solar and wind facilities. It can do so by interpreting the "unreasonably burdensome" preemption provision as requiring a determination that the local law, in its entirety, unreasonably burdens the state in achieving its CLCPA goals before preempting that law.

Land use regulation belongs to those powers that New York municipalities have long considered to be theirs under "home rule."[48] Eliminating it entirely to promote green energy could exacerbate New York's ever-present upstate-downstate, rural-urban divides. Indeed, some upstaters who may otherwise be well-disposed to green energy appear to be already turning against what they view as a renewables infrastructure that serves mainly downstate energy demands but burdens mainly upstate communities and their local foodsheds. As one town supervisor in Schoharie County stated, "This 'streamlining' of green energy siting has toxified the political middle."[49]

In addition, an upstate community land use planner said, "There isn't a town yet that I have worked with that isn't already resentful against Albany – even very liberal, Democratic-oriented communities who otherwise would do everything they could to protect the environment."[50] The political repercussions have also begun. For example, an upstate New York town recently swept out of office the public officials who had approved a wind farm there and is now seeking to reverse the approval.[51]

The New York Legislature should be applauded for establishing itself as a leader in the nation and even the world[52] in addressing climate change and global warming. But state government should redouble its efforts to involve rural communities in energy siting decisions on their land, or upstate support for green energy goals will begin to erode. By reducing the risk of a political backlash or litigation against New York's siting laws, we can continue to build renewable energy facilities at the scale and speed that sensible climate mitigation requires.

Frederic M. Mauhs is a New York environmental lawyer from Schoharie County now living in Westchester County. He holds an LL.M. degree in environmental law (energy and climate change) from the Haub School of Law at Pace University. This article also appeared in The New York Environmental Lawyer (2021, vol. 41, no. 2), a publication of NYSBA's Environmental & Energy Law Section. For more information about this section, please go to NYSBA.ORG/EELS.

Endnotes

1. New York State Climate Leadership and Community Protection Act of 2019 N.Y. Laws ch. 106 (July 18, 2019), codified at N.Y. Environmental Conservation Law §§ 75.0101–75.0119.

2. "Nameplate capacity" is the maximum output of a power plant when built, expressed in terms of megawatts.

3. Paul J. Hibbard et al., *Climate Change Impact and Resilience Study – Phase II: An Assessment of Climate Change Impacts on Power System Reliability in New York State*, 9, Table ES-1 (2020), https://www.nyiso.com/documents/20142/15125528/02%20Climate%20Change%20Impact%20and%20Resilience%20Study%20Phase%202.pdf/89647ae3-6005-70f5-03c0-d4ed33623ce4.

4. *See* BNL Interdisciplinary Science Department, *Long Island Solar Farm* at https://www.bnl.gov/lisf/ (last visited Apr. 15, 2021).

5. Hibbard et al., *supra* note 3.

6. In 2015, the N.Y. Public Service Commission estimated that 70% to 84% of the development of utility-scale solar facilities would occur in the west, central and capital regions of the state. NYPSC Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, *Order Adopting a Clean Energy Standard,* Appendix G at 19 (Aug. 1, 2015).

7. N.Y. Public Service Law Article 10 (hereinafter Article 10).

8. The Accelerated Renewable Energy Growth and Community Benefit Act of 2020, 2020 N.Y. Laws ch. 58, pt. JJJ.

9. N.Y. Executive Law § 94-c.

10. Exec. Law § 94-c (4)(a).

11. Exec. Law § 94-c (2)(h).

12. Exec. Law § 94-c (4)(g).

13. The regulations are codified at N.Y. Comp. Codes R. & Regs tit. 19 §§ 900-1.1–900-15.2 (N.Y.C.R.R.).

14. *See, e.g.,* Michael Gerrard, founder and director of the Sabin Center for Climate Change, acceptance speech for the 2019 New York State Bar Association Environmental and Energy Law Section Council Award at the Section Annual Meeting (Jan. 2020), in 40 N.Y. Envtl Law. No. 1, 5 (2020) (A "breathtaking program of construction of onshore and off-shore wind farms, utility-scale and rooftop solar . . . and much else" must be accomplished "at a much faster pace and much larger scale than ever done before, except during the Second World War, and the existing structure of meticulous and protracted environmental review and permitting may not work.").

15. *See, e.g.,* Michael B. Gerrard and Edward McTiernan, *New York's New Statute on Siting Renewable Energy Facilities,* N.Y. Law J. Vol. 263–93, May 14, 2020 ("[Article 10] has been a miserable failure.").

16. Article 10 § 165(4)(a).

17. Article 10 § 173(13); N.Y. Envtl. Conserv. Law § 8-0111 (ECL).

18. ECL §§ 8-0101–8-0117.

19. Article 10 *§* 168(3)(e); Exec. Law § 94-c (5)(e). For the sake of clarity, this article uses the word "preemption" to describe the ability of the siting board and ORES to set aside local substantive law found to be "unduly burdensome" under the two sections previously cited.

20. *See, e.g.,* N.Y. Town Law § 261 (A New York town board is empowered to enact zoning codes "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community . . . .").

21. N.Y. Const. art. IX § 2(c)(ii)(10).

22. *See, e.g.*, *Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014) (upheld local zoning law that prohibited hydrofracking). *See also* Sarah J. Fox, *Why Localizing Climate Federalism Matters (Even) during a Biden Administration* 1 Tex. L. Rev. 99 (2021), https://texaslawreview.org/online_edition/volume-99 ("Early home rule provisions often took the form of providing local governments with a strong core of authority over 'local' matters, coupled with immunity from state actions in that realm. This approach had the benefit of offering a sense of where local governments would be allowed to act, and where they had no authority to do so.").

23. Gerrard and McTiernan, *supra* note 16.

24. Joseph Goldstein, *A Climate Conundrum: The Wind Farm vs. The Eagle's Nest*, N.Y. Times, June 25, 2019, https://www.nytimes.com/2019/06/25/nyregion/ny-clean-energy-law-wind.html.

25. *Id.*; Gerrard and McTiernan, *supra* note 15 (no solar approved as of May 14, 2020).

26. Goldstein, *supra* note 24.

27. The two largest solar projects approved in this period (those in the towns of Canajoharie/Minden and in Florida) each have nameplate capacities of around 90 MW and will cover over 500 acres in solar arrays; the largest wind project approved in this period (in six townships in Steuben County) will produce 340 MW with 116 turbines.

28. *See* NYPSC Case 17-F-0617, Application of Hecate Energy Albany 1 LLC and Hecate Energy Albany 2 LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for the Construction of a Solar Electric Generating Facility Located in the Town of Coeymans, Albany County, *Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions* (Jan. 7, 2021) (hereinafter *Coeymans Order*).

29. *See* NYPSC Case 17-F-0597, Application of High River Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Florida, Montgomery County, *Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions* (Mar. 11, 2021) (hereinafter *Florida Order*).

30. *See* NYPSC Case 17-F-0597, Application of East Point Energy Center, LLC, for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility in the Town of Sharon, Schoharie County, *Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions,* 71 (Jan. 7, 2021) (hereinafter *Sharon Order*).

31. 6 N.Y.C.R.R. §§ 617.8(e)(5), 617.9(b)(1) and 617.9(b)(5)(v).

32. 40 C.F.R. § 1502.14 ("This section [on alternatives analysis] "is the heart of the environmental impact statement.").

33. The Article 10 preemption of SEQRA is found at Article 10 § 172(1). The enabling legislation for Article 10 also amended SEQRA to include an exemption for Article 10 proceedings. *See* ECL § 8-0111(5)(b). Exec. Law § 94-c's SEQRA preemption is found at § 94-c(6)(a).

34. 18 N.Y.C.R.R. § 1001.9(a).

35. *Coeymans Order*, *supra* note 28 at 15–16.

36. *Coeymans Order*, *supra* note 28 at 17.

37. *Florida Order*, *supra* note 29 at 107.

38. *Id.* at 104–06.

39. *Sharon Order*, *supra* note 30 at 67.

40. *Florida Order*, *supra* note 29 at 107–10; Sharon Order, *supra* note 20 at 68–70.

41. *See also* Case 18-F-0087, Application of Flint Mine Solar, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of a Solar Electric Generating Facility Located in the towns of Coxsackie and Athens, Greene County, *Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions* 66 (Aug. 4, 2021).

42. *See* 16 N.Y.C.R.R. § 1001.9; and PSC Case 17-F-0617, Application of Hecate Energy Albany 1 LLC and Hecate Energy Albany 2 LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Coeymans, Albany County, *Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions* 29 (2021) ("A 'private' facility applicant may limit identification of reasonable alternatives to sites owned by, or optioned to its or its affiliates.").

43. *See* NYPSC Case 17-F-0597, In the Matter of the Application of High River Energy Center, LLC For a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Florida, Montgomery County, *Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions* 103 (Mar. 11, 2021).(rejecting a municipality's argument that, because a developer was able to comply with local setback requirements by simply leasing additional land, the siting board should not preempt those requirements).

44. Article 10 § 168(3)(e); Exec. Law § 94-c (5)(e).

45. Exec. Law § 94-c(5)(f) (If ORES does not render a decision within the statutory time frame, "then such siting permit shall be deemed to have been automatically granted for all purposes set forth in this section.").

46. Exec. Law § 94-c(3)(b).

47. *See, eg*, DMM Matter Number 21-00026, Application of Heritage Wind, LLC for a Permit for a Major Renewable Energy Facility Pursuant to Section 94-c of the New York State Executive Law to Construct a 184.8 MW Wind Energy Facility Located in the Town of Barre, Orleans County, *Ruling on Issues and Party Status*, 52–53 (July 8, 2021. The intention by ORES staff to disregard, or "waive," local law on such matters as nighttime noise levels and wind turbine flicker was not even "adjudicable" – i.e., not subject to review by the ALJs or the commissioner), *aff'd, id., Interim Decision of the Executive Director* (Sept. 27, 2021).

48. N.Y. Const. art. IX § 2(c)(ii)(10).

49. Telephone interview with Donald Airey, supervisor of the Town of Blenheim (Schoharie County) and chair of the Schoharie County Energy Committee (May 7, 2021).

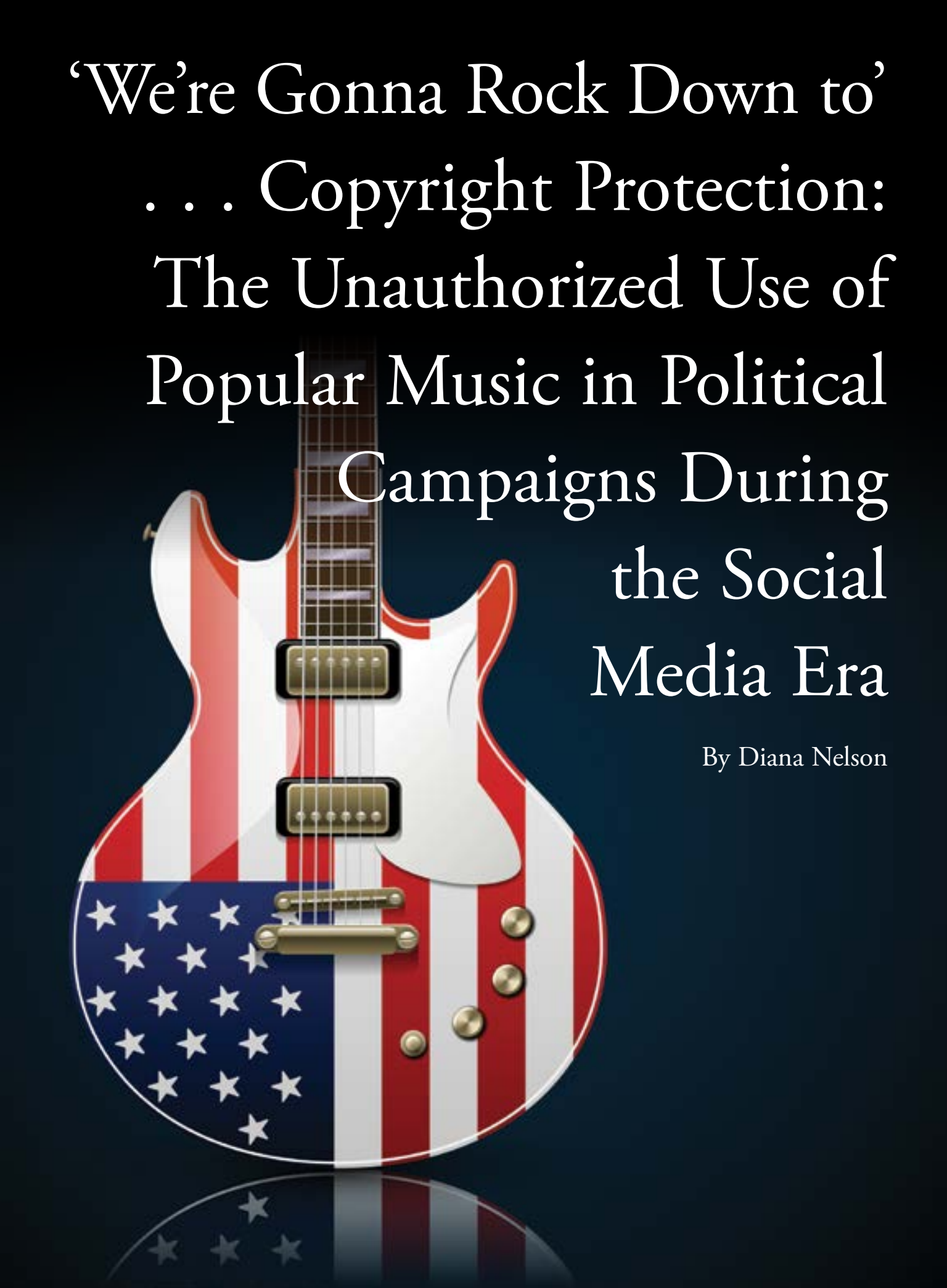
50. E-mail from Nan Stolzenburg, principal planner and founder of the consulting firm Community Planning & Environmental Associates, to author (May 9, 2021).

51. Gregory Meyer, *The U.S. and Climate: New York's Bold Green Plans Hit Opposition*, Fin. Times, Sept. 2, 2020, https://www.ft.com/content/61a07f4f-1622-4bea-a71d-f927cf113636.

52. *Id*. (quoting Peter Fox-Penner, director of Boston University's Institute for Sustainable Energy: "Compared to most other states – and to most other countries – New York's efforts truly are much more thorough and comprehensive.").

‘We’re Gonna Rock Down to’ . . . Copyright Protection: The Unauthorized Use of Popular Music in Political Campaigns During the Social Media Era

By Diana Nelson



To reach voters in the modern era of social media, politicians and political campaigns often use popular songs in their visual and audio campaign materials posted to Twitter, YouTube and other social media sites to convey their messages to voters, to support their campaigns and to criticize their political opponents or their opponents' policies. However, they often fail to seek the authorization of the copyright owners of the songs before doing so. This practice "has become so pervasive, especially during election seasons, that it is not unusual for one single politician or political campaign to face multiple copyright claims from multiple copyright owners."[1] In 2020, Guyanese-British singer Eddy Grant brought suit against former President Donald Trump for Trump's unauthorized use of Grant's iconic song "Electric Avenue" in a video endorsing Trump's reelection campaign posted to Trump's personal Twitter page.[2]

The 55-second animated video begins with a depiction of a high-speed train bearing the words "Trump Pence KAG (Keep America Great) 2020."[3] After the red train passes, "Electric Avenue" starts to play, along with an excerpt of an unflattering speech by President Joe Biden.[4] At the same time, a slow-moving handcar, operated by an animated depiction of President Biden, comes into view bearing the words "Biden President: Your Hair Smells Terrific."[5] The video draws a sharp contrast between Trump's high-powered train and Biden's slow-moving handcar and includes Biden's unflattering language to "criticize President Biden and depict the strength of former President Trump's campaign" and, therefore, served to endorse former President Trump and "denigrate the Democratic Party's 2020 presidential nominee."[6] "Electric Avenue" begins at the 15-second mark and continues until the end of the video.[7]

Grant, along with many other artists who have had their work used in the political sphere without their consent,[8] alleged that Trump not only infringed his exclusive rights as a copyright owner, but also offended his political and moral inclinations.[9] In turn, Trump, along with other politicians and political campaigns who have faced similar suits in the past,[10] argued that he had a right to use Grant's "Electric Avenue" without consent for political purposes under the fair use doctrine and that the video itself was political speech protected by the First Amendment.[11] He brought a motion to dismiss Grant's claims.[12]

The case – *Grant v. Trump* – recently went before Judge John Koeltl in the United States District Court for the Southern District of New York.[13] Judge Koeltl rejected Trump's arguments and denied his motion to dismiss, holding that Trump's unauthorized use of "Electric Avenue" was not protected by the fair use doctrine, and prohibiting use of the song in his political campaign videos did not infringe on Trump's First Amendment rights.[14] Applying the four factors of the fair use doctrine, Judge Koeltl mainly focused on transformativeness.[15] He reasoned that "the creator of the video made a wholesale copy of a substantial portion of Grant's music in order to make the animation more entertaining. The video did not parody the music or transform it in any way . . . [and its] overarching political purpose does not automatically make this use transformative."[16] While Judge Koeltl acknowledged that there is "some inherent tension between the promotion of valuable political satire and the copyright protections of existing art that satirists may wish to use as source material," he explained that the First Amendment cannot be used to circumvent copyright law: "[If] an artist chooses to incorporate existing copyrighted expression of other artists in ways that draw their purpose and character from that work, they must pay for that material. The same principle applies to political satirists."[17]

Judge Koeltl's decision sets an important precedent for courts dealing with the unauthorized use of popular, copyrighted music in political campaigns during the social media era. As more and more artists find their work beginning infringed by politicians and political campaigns online, the concern becomes not only about a violation of law but a violation of the artist's right to free expression. In these politically divisive times,[18] it is important now more than ever to preserve creators' rights not to have their speech used to push political views or messages that they do not support.[19] A song or artist becoming associated with a particular politician, political campaign or viewpoint can adversely affect the marketability or value of the original work, harm the integrity of the artist and impact the artist's incentive to create in the first place. To this end, courts should follow *Grant v. Trump*'s guidance to protect copyright owners' exclusive rights in cases where their songs are used without consent for political purposes and where those political uses are not otherwise "transformative."[20] Doing so is consistent with the First Amendment and does not stifle political speech, discussion or criticism.

In those cases where copyright owners file infringement suits against politicians, campaigns or third parties for their unauthorized uses of copyrighted works, defendants often raise the fair use defense, arguing that their political uses of artists' works are "transformative, primarily commentary, or serve other noncommercial political purposes and uses authorized under the First Amendment."[21] Fair use is an exception in copyright law, codified in § 107 of the Copyright Act, which permits the unlicensed use of copyrighted works under certain conditions. The preamble to § 107 provides a (non-exhaustive) list of examples in which others might use copyrighted works without permission, including for "criticism, comment, news reporting, teaching, scholarship or research."[22]

While politicians and political campaigns, just as anyone else, may use copyrighted works in ways that qualify as fair use with or without permission from the copyright

owners, the fact that a politician or political campaign uses the work in a political context does not mean that the use is more or less likely to qualify as fair use. As the court explained in *Galvin v. Illinois Republican Party*, the "critical and political nature" of a secondary work does not automatically qualify that work as fair use.[23] Rather, fair use is a fact-specific inquiry requiring courts to make a case-by-case determination as to whether an unauthorized use is fair, considering four factors outlined in § 107.[24]

In the seminal case on fair use, *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court explained that the first factor in a fair use inquiry examines whether "the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[25] In other words, a court must determine "whether and to what extent the new work is transformative."[26] While the *Campbell* court acknowledged that "transformative use is not absolutely necessary for a finding of fair use," it emphasized that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works," and therefore "the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use."[27] To that end, while transformativeness is not explicitly articulated in the text of § 107, it remains a key part of the fair use inquiry.

Along with the idea/expression dichotomy,[28] copyright law provides "built in protection for First Amendment interests" through the fair use defense, which serves to balance artists' exclusive rights to their works and the public's First Amendment interests, accommodating new works that "to some extent borrow from previous works."[29] Cathay Y.N. Smith explains that because copyright law already "embodies First Amendment safeguards," courts have refused to expand the fair use doctrine to create an exception to copyright law for those who use an original work in a secondary political work, for what she calls a "political" use.[30]

A Focus on Transformativeness in Political Use Cases: *Grant v. Trump* as Guidance for Courts

Grant v. Trump's Transformative Analysis

In denying Trump's motion to dismiss, Judge Koeltl relied on the first factor of fair use, which examines whether Trump's use of Grant's work was transformative.[31] Trump argued that the video's use of "Electric Avenue" was transformative as a matter of law because the video and the song serve different purposes – as the animation in the video is "partisan political commentary" and "Electric Avenue" is not.[32] However, Judge Koeltl explained that Trump's argument "misapprehends the focus of the transformative use inquiry."[33] He explained that the inquiry does not focus "exclusively on the character of the animation," but rather "focuses on the character of the animation's use of Grant's song."[34]

He further described the character of the video's use of "Electric Avenue" as "wholesale copying of music to accompany a political campaign ad," noting that "the video's creator did not edit the song's lyrics, vocals, or instrumentals at all, and the song is immediately recognizable when it begins playing around the fifteen second mark of the video, notwithstanding President Biden's audio, which can be heard simultaneously."[35] He explained that Biden's speech did nothing to obscure the song, which was "a major component of the animation, even though it appears the video's creator could have chosen nearly any other to serve the same entertaining purpose."[36] He additionally held that the video was not a parody under *Campbell* because it did not use Grant's song to "deliver its satirical message, and makes no effort to poke fun at the song or Grant."[37] Finally, Judge Koeltl concluded that just because Trump's video "on the whole" constituted political messaging, that alone did not render it transformative as a matter of law.[38]

The Transformative Analysis Increases Protection for Copyright Owners in Political Use Cases

In holding that the video's underlying political commentary did not make Trump's use of Grant's song transformative, *Grant v. Trump* set an important standard for other courts in political use cases and provides important protection for copyright owners against politicians and political campaigns who claim that their blanket copying constitutes fair use. In political use cases where courts similarly focused on transformativeness, the copyright owner's exclusive rights were protected.[39]

The Importance of Copyright Protections in the Political Sphere

Judge Koeltl's decision "send[s] a message that recording artists' and songwriters' creative output cannot be arbitrarily usurped by politicians who wish to avoid obtaining permission to use their recordings and pay appropriate licensing fees."[40] Given the pervasiveness of infringement by politicians and political campaigns online, it becomes important now more than ever to protect copyright owners' exclusive rights. Failing to do so can harm an artist's marketability and reputation, can offend that artist's moral beliefs and, notably, can disincentivize that artist to create new works in the future.

In her testimony before the United States Senate Judiciary Subcommittee on Intellectual Property, Grammy award-winning artist and Recording Academy trustee

Yolanda Adams spoke about the economic impact online infringement by political campaigns has on artists – especially during the last few years throughout the COVID-19 pandemic.[41] She notes that with the closure of many venues and the cancellation of in-person performances, many artists have to rely on "multiple income streams."[42] Specifically, she notes that when artists cannot perform, they try to make part of their living off of their recordings and digital streaming, "which only brings fractions of a penny to the creators . . . and they hope to monetize every use."[43] Adams argues that when politicians and political campaigns use artists' music online without permission, they "reduce the artists' ability to earn a living," and their actions "should be treated as infringement, plain and simple."[44] The Copyright Alliance explains that when "politicians and political campaigns use music and other unlicensed works in ways that do not qualify as fair use, they are directly interfering with the creator's revenue stream and the market for the work."[45] Each time this occurs, the copyright owner goes unpaid for uses for which they otherwise would be compensated.[46]

The fourth factor of fair use examines the effect of the political campaign's use of the song on the market for the original song.[47] In *Grant v. Trump*, the court noted that the video's use of "Electric Avenue" may threaten Grant's licensing markets and explained that "widespread, uncompensated use of Grant's music in promotional videos – political or otherwise – would embolden would-be infringers and undermine Grant's ability to obtain compensation in exchange for licensing his music."[48] Additionally, some copyright owners argue that under the fourth factor of fair use, unauthorized political uses of their works "harm their market interests by damaging their reputations."[49] For example, an artist may lose out on future commissions because fans or labels think the artist is endorsing the politician or political campaign who is using their work.[50]

Smith argues that when an artist's work is used without permission for a political purpose, only the "political user benefits without paying the price."[51] She notes that, in many cases, the politicians do not even need to use the copyrighted work because often "they are not using the copyrighted work to comment on the creator's skills or their artistry, but to comment on the subject matter or politician featured in the copyrighted work, which can be achieved through non-copyrighted alternatives."[52] Where, as in *Grant v. Trump*, political defendants could easily choose any other non-copyrighted song available to them to use in their commentary, courts should aim to ensure that copyright owners are protected from those defendants' complete disregard of their exclusive rights.[53]

For Adams, fair use in political cases "is not about money."[54] Rather, "it's about access."[55] She explains that fair use can be unfair if it takes her control away: "If for example, my music were used in a YouTube video that ran counter to my Christian values . . . I should have the right to take it down, regardless of the tests of fair use."[56] Adams expresses the fear many artists have when campaigns use their music without authorization; specifically, that they might become associated with a politician, political campaign or cause that either: (1) "undermines the perceived meaning of their works"; (2) runs contrary to their own political views or beliefs; or (3) offends their moral values.[57] To this end, preserving exclusive rights becomes necessary to allow copyright owners to protect their personal interests, privacy interests or dignity interests in their works.

Finally, unauthorized uses of songs in political campaigns may disincentive artists to continue making new music. If creators are unable to stop unauthorized political uses of their works, they could be less inclined to create new works or "perhaps put less effort into making those works compelling."[58] If politicians could use artists' works for free, it opens the door for anyone to use a song without permission in any way they please, and there would be no reason to pay the artist.[59] As the Second Circuit explains, "this in turn, risks disincentivizing artists from producing a new work by decreasing its value – the precise evil against which copyright law is designed to guard [against]."[60]

Notably, it appears that copyright owners are not trying to enforce their exclusive rights under the Copyright Act in an effort to stifle political speech and discourse. They simply want to prevent politicians and political campaigns from using their copyrighted works and creative expressions without permission for political purposes. As copyright law already embodies two important safeguards protecting political speech in these types of cases, courts do not have to engage in a separate First Amendment analysis when analyzing these claims. Yet even if a court does, artists "can shed light on the significant distinction that exists between political speech and the music utilized in conjunction with a political campaign video."[61] As Judge Koeltl notes, "creators of satirical videos like [Trump's] must simply conform any use of copyrighted music with copyright law by, for example: paying for a license; obtaining the copyright owner's permission; or 'transforming' the chosen song by altering it with new expression, meaning or message."[62] Where the creator of a political campaign video does none of that, they should not be able to claim they are nonetheless entitled to the copyrighted work solely based on purported First Amendment protections.

Throughout the social media era, politicians and political campaigns have shown a blatant disregard for copyright owners' exclusive rights, consistently using artists' work online without permission and subsequently defending their acts on fair use and freedom of speech grounds. Importantly, political use is not synonymous with fair

use. When faced with a political use case, courts should follow *Grant v. Trump*'s guidance and perform a close analysis examining whether the politician or political campaign's use of the artist's work is truly transformative. Doing so protects copyright owners' exclusive rights to their creations and ensures that the original goals of the Copyright Act are achieved.

Diana Nelson is a third-year student at St. John's University School of Law. She interned with the U.S. Court of Appeals for the Second Circuit, the U.S. District Court for the Eastern District of New York and the New York State Court of Appeals. This spring she is interning with Cowan, DeBaets, Abrahams & Sheppard in their IP litigation group. This article appears in a forthcoming issue of the EASL Journal, the publication of the Entertainment, Arts and Sports Law Section. To learn more about the EASL Section, please visit NYSBA.ORG/EASL.

Endnotes

1. *See* Cathay Y. N. Smith, *Political Fair Use*, 62 Wm. & Mary L. Rev. 2003, 2006 (2021). Professor Cathy Y. N. Smith notes that in the span of just one month, Tom Petty, Panic! At the Disco, the Rolling Stones, Neil Young, and Linkin Park all publicly denounced and demanded that former President Donald Trump cease using their music to promote his 2020 reelection campaign. *Id.*

2. *See* Glenda Dieuveille, *When is Music in Political Campaigns Transformative? SDNY Judge Rejects Trump's Fair Use Arguments*, Frankfurt Kurnit Klien + Selz P.C., Oct. 5, 2021, https://ipandmedialaw.fkks.com/post/102h7yc/when-is-music-in-political-campaigns-transformative-sdny-judge-rejects-trumps-f.

3. *See Grant v. Trump*, No. 20-CV-7103 (JGK), 2021 WL 4435443, at *1 (S.D.N.Y. Sept. 28, 2021).

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. A long list of musicians, including Jackson Browne, Don Henley and David Byrne, have taken political campaigns to court over the years for using copyrighted songs without permission. *See* Joel Rose, *Music in Political Campaigns 101*, NPR, Feb. 29, 2012, https://www.npr.org/sections/therecord/2012/02/29/147592568/music-in-political-campaigns-101.

9. *See Grant*, 2021 WL 4435443, at *2.

10. John McCain made similar arguments when he was sued by Jackson Browne for his unauthorized use of Browne's "Running on Empty." *See* Mary Ann Akers, *Jackson Browne v. John McCain–Heading to Trial?*, The Washington Post, Feb. 23, 2009, http://voices.washingtonpost.com/sleuth/2009/02/jackson_browne_v_john_mccain_-.html.

11. *See Grant*, 2021 WL 4435443, at *1.

12. *See id.*

13. *See id.* at *1.

14. *See id.* at *7.

15. *See id.* at *8.

16. *See id.*

17. *See id.* at *7.

18. *See Political Polarization in the American Public*, Pew Research Center, Jun. 12, 2014, https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public (finding "Republicans and Democrats are more divided along ideological lines–and partisan antipathy is deeper and more extensive–than at any point in the last two decades").

19. *See Is It Considered Fair Use for a Political Campaign to Use Music or Other Copyrighted Works?*, Copyright Alliance (2021), https://copyrightalliance.org/education/qa-headlines/music-in-political-campaigns-fair-use.

20. *See Grant*, 2021 WL 4435443, at *4.

21. *See* Smith, *supra* note 5, at 2039.

22. *See* 17 U.S.C. § 107.

23. *See Galvin v. Illinois Republican Party*, 130 F. Supp. 3d 1187, 1193 (N.D. Ill. 2015).

24. The court considers: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

25. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Campbell specifically addressed the role of fair use with respect to parodies, which are often used in political campaigns to criticize or comment on a political opponent. *Id.* at 586. *Campbell* explained that parodies "need to mimic an [original work]" to make a point and provide "social benefit by shedding light on an earlier work, and, in the process, creating a new one," and therefore "have an obvious claim to transformative value." *Id.* at 579.

26. *See id.*

27. *See id.*

28. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985), the Supreme Court noted that copyright's idea/expression dichotomy "strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts, while still protecting an artist's expression."

29. *See* David L. Hudson Jr., *Copyright & The First Amendment*, Freedom Forum Institute, Aug. 5, 2004, https://www.freedomforuminstitute.org/2004/08/05/copyright-the-first-amendment.

30. *See* Smith, *supra* note 5, at 2011; *see also Harper & Row Publishers, Inc.*, 471 U.S. at 560.

31. *See id.*

32. *Id.* at *3.

33. *Id.*

34. *Id.*

35. *Id.* at *4.

36. *Id.*

37. *Id.*

38. *Id.*

39. *See Henley v. DeVore*, 733 F. Supp. 2d 1144, 1148 (C.D. Cal. 2010); *see also Hill v. Pub. Advoc. of the United States*, 35 F. Supp. 3d 1347, 1352 (D. Colo. 2014).

40. *See id.*

41. *See* Recording Academy, Testimony of Yolonda Adams, *How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?,* Jul. 28, 2020, https://www.judiciary.senate.gov/imo/media/doc/Adams%20Testimony1.pdf.

42. *See id.*

43. *See id.*

44. *See id.*

45. *See Is It Considered Fair Use for a Political Campaign to Use Music or Other Copyrighted Works?*, Copyright Alliance (2021), https://copyrightalliance.org/education/qa-headlines/music-in-political-campaigns-fair-use.

46. *See id.*

47. *See Grant*, 2021 WL 4435443, at *4.

48. *Id. at* *7.

49. Smith, *supra* note 5, at 2059.

50. *See id.*

51. *See id.* at 2048.

52. *See id.*

53. *See Grant*, 2021 WL 4435443, at *4.

54. Recording Academy, *supra* note 41, at 2.

55. *See id.* at 3.

56. *See id.*

57. *See* Smith, *supra* note 5, at 2071. For example, in June 2020, Tom Petty's family objected to Trump's use of Petty's "I Won't Back Down" at his rally in Oklahoma. *See* Christianna Silva, *Tom Petty's Family Doesn't Want Trump Using His Music for a 'Campaign of Hate'*, NPR, Jun. 21, 2020, https://www.npr.org/2020/06/21/881444533/tom-pettys-family-doesn-t-want-trump-using-his-music-for-a-campaign-of-hate. Petty's Instagram account issued a statement following a cease-and-desist letter to the Trump campaign, saying: "Both the late Tom Petty and his family firmly stand against racism and discrimination of any kind. Tom Petty would never want a song of his used for a campaign of hate. He liked to bring people together." *Id.*

58. *Id.* at 2067.

59. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 114 (2d Cir. 2021).

60. *Id.*

61. Taylor L. Condit, *The Need for Songwriters' Control: A Proposal to Prevent Unwanted Uses of Musical Compositions at Political Rallies*, 47 Sw. L. Rev. 207, 211 (2017).

62. *Grant*, 2021 WL 4435443, at *7.

Deposition Protocols: A Matter of Opinion?

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

To the Forum,

I am a junior associate and was tasked with defending a witness deposition on a typical personal injury case. Plaintiff's counsel made good points and got some pretty damaging (depending on your perspective) testimony. The client's general counsel was present and seemed a bit concerned and anxious. During a break, the GC and I counseled the witness on how to rehabilitate her testimony, giving her some points to make during the remainder of the deposition.

Once we went back on the record, opposing counsel questioned the witness on any communications she had with me and the GC during the break. I strenuously objected to any details about the conversation because it was clearly privileged. Opposing counsel disagreed and marked the transcript for a ruling and was visibly frustrated by what he said was a clear "breach of deposition protocol."

I debriefed the deposition with my senior partner, who told me that I had nothing to worry about and I was right to counsel the witness on how to rehabilitate her testimony. According to the senior partner, I had done well and that is "the way it has always been done."

I am now confused. The plaintiff's attorney seemed so confident in his position, but the senior partner has been practicing for so long. Was I right, was I wrong?

Sincerely,
Waverly E. Squire

Dear Waverly,

It can be challenging for attorneys (even for senior counsel) to navigate the boundaries of discovery, ethics and professionalism rules and contemporaneously reconcile them with practical guidance. Attorneys face a more formidable challenge in time-sensitive or high pressure, on-the-record situations in a deposition, hearing or trial. Sure enough, these rules also vary from state to state and sometimes court to court (and do vary in New York's federal courts).

These situations rarely offer attorneys an adequate opportunity to confer with colleagues and superiors or conduct legal research. Developing good judgment and relying on experience can be invaluable, though neither are substitutes for familiarity with the rules.[1] To be sure, no statute or rule imposes a categorical and self-executing bar on communications between party and counsel during a break in trial testimony.[2] It is the extent to which the deposing counsel can inquire about the contents of that conversation that are the focus here.

There certainly are instances when the attorney-client privilege is waived, and some federal courts in New York allow deposing attorneys to question the witness after the break "to ascertain whether there has been any witness-coaching and, if so, what."[3] Yet others allow the deposing attorney to inquire about the general subject matter of the conversation, absent special circumstances.[4] Attorneys risk undermining the goal of defending the client by seeking, however justly, to rehabilitate testimony if by doing so they waive the privilege.[5]

There is a cost-benefit analysis to be made during that break. The impact a perceived change in testimony may have will be – when looking at the entire deposition record – a function of credibility and within the purview of the factfinder.[6] Talking with the witness about testimony will invite inquiry and could impact witness credibility. Counsel may yet have an opportunity to confront the witness with any conflicting testimony at trial, much as you would have an opportunity to rehabilitate problematic testimony, even in the deposition itself.[7]

As a practical matter, the scope of examining your own witness in a deposition will be limited to the scope of the direct examination, as it is not advisable to open new doors unless your witness is not expected to be available at the time of trial. In practice, the attorney taking the deposition can question your witness on a very wide range of subjects, as the questioning is legitimate if it is calculated to lead to discoverable information. Courts opining on motions concerning this testimony can and do exercise broad discretion to allow cross-examination testimony.[8] CPLR 3113 (c) provides that cross-examination need not be limited to the subject matter of the examination in chief.

Here, again, developing sound judgment is helpful insofar as the judge is generally not present to provide any judicial direction in a deposition. When rehabilitating your witness, you should be careful not to invite further cross-examination from your opposing counsel by opening new doors of inquiry, as your opposing counsel will have the right to more fully examine your witness on that topic. The extent and degree to which the door has been opened is approached on a case-by-case basis.[9]

That notwithstanding, consulting your senior partner was absolutely correct. It will not surprise the reader to know that attorneys regularly disagree on how to interpret rules and experience. The Rules of Professional Conduct (RPC) provide oversight mechanisms for subordinate attorneys.[10]

The deposing counsel would always have the burden of demonstrating that otherwise privileged communications between the client and attorney lose that status merely by virtue of being "impermissible" under the rules governing depositions.[11]

We must distinguish between successfully challenging your objection, instructing your witness not to answer a pending question, breaking during a pending question and seeking leave of the court to obtain testimony (or harder yet, sanctions) on conversations between counsel

and client during a break.[12] Conferring with a deponent whilst a question is pending or taking a break during the pendency of that question to counsel a witness will likely invite the ire of the court, if not worse. In many jurisdictions, consultations, at naturally occurring breaks in the deposition, have been given more favorable treatment.[13] There is even greater leniency with overnight breaks and multi-day examinations or adjournments.

Nothing in your prompt suggests you encouraged dishonesty, advised the deponent not to answer truthfully or evade questions asked, but to seize opportunities to potentially highlight favorable facts. Experience suggests that carefully cross-examining a witness on the record (whether in the deposition or at trial) can also accomplish the same rehabilitative goal.

Sincerely,
The Forum by:
Jean-Claude Mazzola
jeanclaude@mazzolalindstrom.com
Hanoch Sheps
hanoch@mazzolalindstrom.com

QUESTION FOR THE NEXT FORUM

To the Forum:

I am a personal injury lawyer and have a small firm with a few partners. I represent a retiree who worked for 25 years at a plant making plastic products owned by "Endorphin, Inc." After his retirement, my client developed a particular form of cancer, which he was certain was related to his long-term exposure to harmful chemicals at the plant. After doing the necessary research, I sued Endorphin on my client's behalf, under a one-third contingency arrangement.

In the course of discovery – all conducted under strict confidentiality orders – I saw Endorphin documents that I realized showed that company executives ignored warnings about the risks. The defendant is now offering a $20 million settlement, which my client is willing to accept. With some pride, I attribute the large amount to my own particular abilities and expertise, including my undergraduate training in chemistry, which enabled me to understand the technical documents and detect and understand the cleverly worded warnings.

I have separately been contacted by several other former Endorphin workers who want to sue Endorphin for their own medical injuries, but none of them has formally retained me – yet.

Defendant's counsel has sent me a draft settlement agreement, which would require that my firm and I

- not represent anyone pursuing a similar claim against Endorphin or any other defendant;
- not assist in, or encourage, any suit against Endorphin or any other defendant for a similar claim; and
- keep confidential the existence and amount of the settlement and all information we learned in the course of this representation (absent judicial process compelling disclosure, in which case we must provide Endorphin with sufficient notice and opportunity to contest such process).

I want to settle my client's case and get him the award to which he is entitled. But I also want to represent other clients against Endorphin, and these provisions would make that impossible. What should I do?

Sincerely,
Clara Contingency

1. According to Uniform Rules for the Conduct of Depositions, "[a]n attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly." N.Y. Comp. Codes R. & Regs. tit. 22, § 221.3.

2. CPLR 3113(c) states, "[e]xamination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court." N.Y. CPLR 3113. *Brightman v. Corizon, Inc.*, 72 Misc. 3d 1213(A) (Sup. Ct., N.Y. Co. 2021). The Federal Rules of Civil Procedure do not address this issue.

3. *Jones v. J.C. Penney's Dept. Stores, Inc.*, 228 F.R.D. 190, 204 (W.D.N.Y. 2005).

4. *Gibbs v. City of N.Y.*, CV-06-5112 (ILG) (VVP), 2008 U.S. Dist. LEXIS 22588, *5–6 (E.D.N.Y. March 21, 2008).

5. *Gray v. Cleaning Sys. & Suppliers*, 143 F.R.D. 48 (S.D.N.Y. 1992) (stating that the goal of discovery and trial is truth-finding). Attorneys would add insult to injury by allowing a court to conclude that justice is better served by revealing information discussed in break that would not have otherwise been disclosed.

6. Competing evidence must be weighed and the credibility of the witnesses must be assessed by a factfinder, and is rarely, if ever, decided even on a motion for summary judgment. It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof). *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012); *Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d 1039, 1044 (2016).

7. We do not address here what to do if your witness gives an inaccurate answer at a deposition. Generally, there is more acceptance and tolerance of counseling a deponent during a break to correct clear misstatements of facts.

8. *People v. Bailey*, 159 A.D.2d 862, 864 (3d Dep't 1990) (holding that the extent of redirect examination is for the most part governed by the discretion of the trial court), citing *People v. Melendez*, 55 N.Y.2d 445, 451 (1982).

9. *People v. Bailey*, 159 A.D.2d 864.

10. RPC 5.1 requires a law firm to "make reasonable efforts to ensure that all lawyers in the firm conform to these Rules." We caution that RPC 5.1, when read in conjunction with RPC 5.2 can bind a lawyer notwithstanding whether the lawyer acted at the direction of another, or ratify the others' behavior.

11. *Brightman v. Corizon, Inc.*, 72 Misc. 3d 1213(A) (Sup. Ct., N.Y. Co. 2021).

12. The Uniform Rules provide that even when a proper objection has been posed, the witness must still *ordinarily* answer the question—and that counsel may not direct the witness to refrain from answering. (*See* 22 N.Y.C.R.R. § 221.1 [a], 221.2.)

13. Pennsylvania is an exception to this general trend, following a hardline standard against in-deposition consultations. *See Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

NYSBA'S Legislative Priorities: Where We Stand

As the second half of the 117th Congress gets underway in Washington, the next few months are critical for the success or failure of President Biden's agenda and the completion of any legislative accomplishments. The midterm elections will be held in November and, historically, the party in power loses seats. In the House of Representatives, all 435 members face reelection. The Democrats hold a narrow four-seat majority. In the Senate, 34 members are up for reelection. In the evenly divided Senate, Democrats must defend 14 seats and Republicans need to protect 20 seats.

An election year poses hurdles for passing ambitious legislation. But this year, given the increased polarization of the legislative body, hardened political rhetoric and a lingering pandemic, it may be a challenge to pass any legislation. And now we have to add a Supreme Court nomination to the agenda. This would be difficult with a full cohort of senators engaged and voting, but U.S. Sen. Ben Ray Lujan's recent stroke, and resulting absence from the Senate for recovery, further complicates the politics and the math of legislating.

Over the past 40 years, the average amount of time from nomination to confirmation is 70 days. While the Amy Coney Barrett nomination was concluded in near record time, it is expected that the Breyer vacancy will be addressed over the more typical two to three months. With an already contentious political environment, a crowded legislative calendar and a limited number of days in Washington, the fate of many issues is up in the air given the necessity to confirm a new Supreme Court justice.

But there are many critical issues that warrant Congressional attention, and NYSBA will continue vigorous advocacy on several that affect the core mission of the association, which is to promote equal access to justice for all.

Each year, the New York State Bar Association develops its federal legislative priorities and submits them to Congress for consideration. This year, the association submitted 10 legislative priorities. This article explores the political landscape for the four new priorities.

Modernizing Policing at Key Stages

We are at a crisis point with policing in the United States. Harmful policing practices are resulting in misconduct that disproportionately impacts Black people and a culture that allows these practices to continue unchecked.

Policing needs to be brought into the 21st century by improving policing at every stage, from hiring to discipline.

The Association supports:

- Creating a national registry to track problem officers to bolster police accountability and prevent officers with a history of discipline from moving from one department to another.
- Prohibiting profiling based on race and religion and mandating training on profiling.
- Banning chokeholds, carotid holds and no-knock warrants.
- Requiring the use of federal funds to ensure use of body cameras.
- Amending the prosecution standard for police from "willfulness" to "recklessness" and reforming qualified immunity.

- Requiring stronger data reporting on police use of force.

These priorities were developed by the NYSBA Task Force on Racial Injustice and Police Reform and adopted by the House of Delegates.

The U.S. House of Representatives passed the George Floyd Policing Bill, which addressed many of these provisions. President Biden set a goal of May 25, 2021, the anniversary of George Floyd's murder, for Congress to enact this bill. However, despite high level bicameral bipartisan negotiations, an agreement in the Senate could not be reached by that date. As of the writing of this article, an agreement has still not been reached.

Equality Act

The New York State Bar Association supports the right of all individuals to be treated with respect and dignity and proudly supports the Equality Act. This measure would expand the protected category of "sex" to include "sexual orientation and gender identity" and provide additional protections within the new expanded category. It would bar discrimination in employment, public schools, housing, credit opportunities, juries and federally funded programs on the basis of sex, gender identity and sexual orientation. It also would prohibit discrimination in places of public accommodation, restaurants, entertainment venues, retail stores, transportation services, health care facilities and funeral homes. Additionally, individuals could not be denied access to shared facilities, such as bathrooms and locker rooms, in accordance with their gender identity. This bill, HR 5, passed the House of Representatives but awaits action in the Senate, where it faces an uphill battle for passage in a divided chamber.

Violence Against Women Act Reauthorization

The Violence Against Women Act (VAWA) is a landmark law first championed by President Biden when he was in the Senate in 1993. The impact of VAWA legislation over a quarter of a century has been transformative, directly impacting the lives of countless survivors of domestic violence, sexual assault, stalking and dating violence. It has been reauthorized three times, each serving as an important opportunity for Congress to expand and enhance the tools and initiatives combating these forms of gender-based violence. The last reauthorization, VAWA 2013, enhanced measures to combat trafficking in persons and to address sex trafficking. VAWA lapsed in 2018, and reauthorization efforts in 2019 failed, leaving many critical programs unfunded. Congress cannot repeat this missed opportunity to enhance protections for survivors of gender-based violence. As of the writing of this article, the House and Senate were close to coming to an agreement to support this measure.

Voting Rights

The right to vote is a fundamental value guaranteed by the United States Constitution. It establishes a benchmark for public participation and must be protected and preserved. The New York State Bar Association has a long history of supporting measures that increase voter participation and inclusion of all communities, prevent discriminatory voting practices anywhere in the United States and protect access to the ballot and the sanctity of the vote. In light of recent measures enacted in states throughout the country, national protection of this fundamental right is more necessary than ever. Bills to accomplish this have passed the House but have not been able to overcome the filibuster in the Senate. Barring some procedural shenanigans, the filibuster will remain in place and the bills will not pass. There is a chance that the president could enact some voting and electoral reforms by executive action.

Other priorities included in NYSBA's federal priorities include:

- Student loan relief for attorneys and non-attorneys in rural, suburban and urban areas.
- Support for the Legal Services Corporation (LSC).
- Cannabis.
- Firearms and mass shootings.
- Legislative reform to address the crisis in immigration representation.
- Sealing records of criminal conviction.

As we have experienced over the past two years, we live in a fast-changing world, with Congress having to act quickly to respond to health, safety and political events. The federal priorities are intended to serve as a blueprint for NYSBA action for 2022, but the association will need to be responsive to events and adjust priorities as necessary throughout the year. Flexibility may be critical, but the association will remain a staunch advocate for policies that promote our core values and mission to promote equal access to justice for all. If you are a NYSBA member interested in becoming involved in the legislative priorities process, please look out for an email this summer with more information on how to engage.

For more information on these important priorities, please visit the Government Relations Home Page at NYSBA.ORG/GOVERNMENTRELATIONS.

Hilary Jochmans, policy director for NYSBA, writes about legislation of interest to members. Previously Jochmans was the director of the New York State governor's office in Washington for both Andrew Cuomo and David Paterson and has spent a dozen years on Capitol Hill working in the House and Senate.

School Board Survival: Navigating Turbulent and Contentious Public Meetings

By Jennifer Andrus

Concerns over infection rates, remote learning and mask mandates are some of the issues taking center stage at school board meetings both in New York State and across the country. The politically divided electorate is focusing its energy and sometimes its rage on local elected officials.

NYSBA held a program on Jan. 11 for its members and members of the public to discuss strategies to turn down the volume of these emotional meetings, find new ways to communicate and serve as role models for students.

"We must ensure that our disagreements are expressed in a civil and constructive manner. We must insist that we practice what we preach during school board meetings" said Jay Worona, the deputy executive director of the New York State School Boards Association. He said all adults in the community are responsible for teaching students how to be active and productive citizens.

Key Strategies for Success

Worona laid out key strategies for board members and others to use to keep meetings both open and productive. While New York State's Open Meetings Law does not require a public comment period, Worona advises districts to have one. Boards can limit time allotment and topics for public comment prior to the meeting. Worona also advises that the president of the board read ground rules for conduct at the start of the meeting including consequences for unruly behavior. He warns against removing disruptive members of the public from the meeting, calling it a "nuclear option," and advises boards to have local law enforcement ready at meetings for both safety and deterrence.

David Alpert, communications director for the New York State School Boards Association, shared several de-escalation techniques. Alpert advises that board members not feed into anger and emotion or attempt to counter the argument but clarify any misinformation after a person is finished speaking. Alpert's main point is to seek to understand and make sure the community member feels heard.

Citizen Participation

Following de-escalation training, Alpert focused on three approaches to creating more citizen participation, which can diffuse anger and build community when dealing with critical issues.

"The goal here is to bring people into the decision-making process so they don't feel upset or aggrieved and show up at your public board meeting and be disruptive," he said.

Strategies include looking for mutual gains and building consensus through community conversations early in the process. Alpert advises against holding a public hearing in which organized groups can dominate the discussion.

Lastly, Alpert focused on the strategy of informed consent. It acknowledges the shared values in the community and seeks out a fair resolution. Alpert says by using this method, even those who oppose the final decision understand the process and feel they are a valued part of arriving at the decision-making.

View From the Trenches

The workshop wrapped up with a "from the trenches" perspective provided by Kevin McGowan, superintendent of the Brighton School District outside Rochester. McGowan shared that he prepares his board members for each meeting by reminding them of their roles, telling them which groups may be coming and keeping an eye on both social media and traditional media sources.

McGowan and local police design safety and evacuation plans for the board meeting. He counsels board members to employ signals to move to executive session or adjourn the meeting if they feel uncomfortable or in danger. He agreed with other presenters that it's important to be clear and compassionate when countering false information.

"We are public leaders in our community, looked to for guidance by many people. Making sure that we're not allowing the lie to spread and become a fact because it's been said so many times," he said. McGowan went on to say that the Brighton School Board meetings have a growing audience of students who are tuning in and learning from adults in the community.

"We can disagree without being disagreeable. It is OK to be passionate about our perspective even when our perspectives are very, very different. Our kids are watching," he said.

Judge Leslie Stein Receives Prestigious State Bar Association Award

By Brandon Vogel

Former Court of Appeals Judge Leslie E. Stein of Albany, director of the Government Law Center at Albany Law School, has been chosen to receive the Ruth G. Schapiro Memorial Award from the New York State Bar Association's Women in Law Section. She was honored Jan. 25 at the association's Annual Meeting.

"Throughout her distinguished career, Judge Leslie Stein set the example for all attorneys through her hard work, legal acumen and extraordinary public service," said Women in Law Section Chair Sheryl Galler (Law Office of Sheryl B. Galler). "We are delighted to honor her with this prestigious award in recognition of her achievements and accomplishments. She has made the legal profession a better place for lawyers and the public."

Judge Leslie Stein

Judge Stein began her judicial career in January 1997 on the Albany City Court while serving simultaneously as an acting Albany County Family Court judge. Four years later, Judge Stein was elected to the New York State Supreme Court, Third Judicial District. In 2014, Gov. Andrew Cuomo appointed Judge Stein to the Court of Appeals where she remained until her retirement in June of 2021.

While on the bench, Judge Stein served as co-chair of the New York State Unified Court System Family Violence Task Force and chair of the Third Judicial District Gender Fairness Committee and was a founding member of the New York State Judicial Institute on Professionalism in the Law. She also served on the Executive Committee of the Association of Justices of the Supreme Court of the State of New York, as an officer of the New York State Association of City Court Judges, and as a member of the Board of the New York Association of Women Judges.

She is a past president of the Capital District Women's Bar Association and was a vice president of the Women's Bar Association of the State of New York, where she held important leadership positions. At NYSBA, Judge Stein has been a member of the Task Force on Increasing Diversity in the Judiciary, the Committee on Women in the Law, the Family Law Section Executive Committee, and a frequent lecturer at CLE programs. Judge Stein has also been active in the Albany County Bar Association for many years.

The award recognizes a State Bar member for his or her outstanding contributions to addressing the concerns of women. It is named for the late Ruth G. Schapiro, a nationally regarded tax lawyer, who was the first female partner at Proskauer. Active in the State Bar Association, she was the first chair of the Committee on Women in the Law, the chair of the Tax Section and the Finance Committee, and one of the first women to serve on the Executive Committee. She died in 1991. The Ruth G. Schapiro award was created in her honor in 1992.

Michele Kahn Receives Inaugural LGBTQ+ Vanguard Award

By David Howard King

Michele Kahn is the recipient of NYSBA's inaugural LGBTQ+ Vanguard Award for her decades of advocacy for the LGBTQ community.

The award was presented at the association's Annual Meeting on Jan. 19. Kahn became the first chair of NYSBA's Special Committee on LGBTQ People and the Law in 2008 and helped drive the organization's support of same-sex marriage.

"Michele Kahn has been a pioneer of LGBTQ+ rights and family law for many decades," said LGBTQ Section Chair Christopher R. Riano. "Michele has done more for our community than any of us can possibly express, including with her formative leadership here at the New York State Bar Association. Her work has assisted countless LGBTQ+ couples, and we could not be more honored to give her our inaugural annua Vanguard Award."

Kahn earned her degree from Boston University School of Law with honors before going on to work at two large New York City law firms. Soon she launched her own practice and then in 2006 joined with Eric Goldberg to create Kahn & Goldberg in New York City.

Michele Kahn

NYSBA Recognizes Vincent Syracuse With Sanford Levy Award for Professional Ethics

By Brandon Vogel

Manhattan attorney Vincent J. Syracuse (Tannenbaum Helpern Syracuse & Hirschtritt) is the 2022 recipient of the Sanford Levy Award, presented by the Committee on Professional Ethics.

The award goes to an individual or institution that has contributed the most to the advancement of professional ethics. Syracuse received the award at a virtual ceremony on Feb. 16.

"Vince Syracuse has given back so much to the legal profession through his continuing legal education programs on ethics and civility, as well as his well-read column, the Attorney Professionalism Forum," said Richard Hamburger of Melville (Hamburger, Maxson, Yaffe & Martingale), chair of the Committee on Professional Ethics. "We are pleased to honor his contributions to the field."

Since 2012, he has written the monthly Attorney Professionalism Forum in NYSBA's Bar Journal, covering a variety of topics of interest to the bench and bar. In August 2021, the association published the Attorney Professionalism Forum in eBook and print formats, a collection of more than 75 articles written between January 2012 and December 2020. He is also a co-author of the chapter on the ethics of virtual lawyering in NYSBA's eBook "Virtual Lawyering: A Practical Guide," which was published in August 2020. He has also served as chair of the Commercial and Federal Litigation Section.

Syracuse is a senior partner at Tannenbaum Helpern Syracuse & Hirschtritt and the founder of its litigation and dispute resolution practice. He is a graduate of Brooklyn College and Brooklyn Law School, where he earned his Juris Doctor degree and was a member of the Law Review.

Vincent J. Syracuse

Past recipients include former Chief Judge Judith S. Kaye, Prof. Bennett Gershman, and Prof. Rebecca Roiphe.

Justice Barbara Kapnick Reflects on Her Life and Career

By Susan DeSantis

Justice Barbara R. Kapnick, Appellate Division, First Department, has been a longtime member of the New York State Bar Association and chaired the association's Judicial Section during the early days of the pandemic. She talked recently to the Bar Journal about her life and career.

Q: What advice would you give to new lawyers?

A: I would say to new lawyers "You shouldn't be looking to spend your whole life working virtually. I know it's very convenient, but lawyers should try to get into the office a few times a week because you don't get to meet people on Zoom even if you do get to look at them. When we're in the office or see each other at a bar association, we interact; we sit down for lunch; we sit down for a drink." I think that's something that younger people are going to find out when it's too late that they missed the boat on. It's important to find mentors as you start out your career.

Q: What did you learn from the pandemic about the importance of bar associations?

A: I have always been a big proponent of bar associations since my very early days when my mentor, the judge for whom I worked, said "Come to this bar association dinner with me." I said, "Well, I don't know anybody." She said, "It's OK, I know everybody." So, I went with her, and I recognized a couple people from court and started to talk to them, and some people invited me to sit with them and by the next time I went to the bar association, I knew a lot more people and a lot more people the next time, and it was like a domino effect.

As a judge in the New York State court system, the New York State Bar Association is relevant to the work that I do. It's important to join NYSBA because they have lawyers from all over the state and they cover every area of practice. If you're going to be in this profession, you want to know what's going on. So, to isolate yourself doesn't make sense.

Q: What were your proudest accomplishments when you were chair of NYSBA's Judicial Section during the pandemic?

A: It was an absolute honor to be the chair of the Judicial Section although obviously the biggest disappointment was that everything had to be done virtually. But because everything was virtual, people were anxious to know what was going on and so we had very good turnouts at the meetings. We tried to all share experiences, and it became more important than ever to be able to do that, so I think we became a good sounding board for everybody. We were also asked to weigh in on certain legislation and rules that we might not ordinarily have been.

Q: Why did you decide to become a judge?

A: I worked at a law firm and one of the women at the firm became a judge. When I was finishing up law school, I talked to her and she said, 'I have a really great woman judge who's going to need a law clerk and I think you'd be great.' She introduced me and we hit

Justice Barbara Kapnick

it off and she hired me, and I figured I would stay for a couple years. After two years, I was loving it and I thought I was efficient in the courtroom, I was writing well, I had a good sense of how to move things along and so I stayed. Sadly, the judge had a recurrence of cancer and ultimately passed away. But I decided to continue. I went to work for another judge, Michael Dontzin, who was terrific and became a wonderful mentor and a friend. Many years later, when I decided I would apply to be a judge, it wasn't because I had a really strong political background that I was selected but because I had been so active in bar associations. The screening panels have people from different bar associations. So, a lot of people knew me or had seen me in court and thought I would do a good job and I was recommended.

Q: What has your career as a judge been like?

A: On my first day, the phone rang, and the chief clerk of the Civil Court said, "We would never ask a new judge to do this, but you know how to run a courtroom. The judge in the big motion part called in sick and we don't have anybody else. I said I'd love to do it. So, I put on my robe and the court officer said, "All rise. Special Term, Part One, is now in session, the Honorable," and he looked at me and said, "Who the heck are you?" I didn't have a name plate. I didn't have my stamp. They threw me in the first minute and I've been working hard ever since. Now, 30 years later, I still really love what I do.

Roy M. Warner

PRESSED FOR TIME? Experienced NY Counsel, peer-reviewed author and CLE Lecturer offering consultations and extensive services for pleading, discovery, appeals, motions, trial preparation and more. I personally and confidentially review your underlying documents, research points of law and draft what is needed.

Visit www.coveringcounsel.com for details.
t. 561-504-2414
e. roy.warner@coveringcounsel.com

MEDICAL EXPERT IN THORACIC AND VASCULAR SURGERY, NON-INVASIVE VASCULAR TESTING AND WOUND CARE

I have practiced thoracic and vascular surgery since 1991. I maintain an active practice and am former Medical Director of Champlain Valley Physicians Hospital Wound Center. I am certified by the American Board of Thoracic Surgery and am a Registered Physician in Vascular Interpretation.

I review for the New York State Office of Professional Medical Conduct and have had over ten years of experience in record review, determinations of standard of care, deposition and testimony in medical malpractice cases.

Craig A. Nachbauer, M.D.
North Country Thoracic and Vascular, PC
12 Healey Avenue
Plattsburgh, NY 12901
Phone: (518) 314-1520
Fax: (518) 314-1178

www.lawspacematch.com

Find a clean LawSpace to sublease within a law office. Search for free by zip code and connect with Lawyers. Renting empty space instantly: www.lawspacematch.com

FLORIDA ATTORNEY | TITLE COMPANY

STRALEY | OTTO & ACTION TITLE COMPANY over 35 years' experience in Real Estate, Title Insurance, Probate, Guardianship, Estate Planning, Business Transactions, and Community Association Law.

Dedicated to providing superior service and quick turnaround time for Legal and Title Work. For Co-Counsel or Referral contact: 954-962-7367
SStraley@straleyotto.com

www.Straleyotto.com
www.ActionTitleco.com

MEMBERS OF THE HOUSE OF DELEGATES

First District

* Alcott, Mark H.
Baum, Simeon H.
Ben-Asher, Jonathan
Berman, Mark Arthur
Boston, Sheila S.
Carter, Ralph
Chandrasekhar, Jai K.
Chang, Vincent Ted
Cohn, David M.
D'Angelo, Christopher A.
Dean, Robert S.
Eng, Gordon
Farber, Michael S.
Filemyr, Edward J., IV
Finerty, Margaret J.
* Forger, Alexander D.
Fox, Glenn G.
Friedman, Richard B.
Grays, Taa R.
Griffin, Mark P.
Haig, Robert L.
Harvey, Peter C.
Hecker, Sean
Himes, Jay L.
Hoffman, Stephen D.
Holder, Adriene L.
Jaglom, Andre R.
†* James, Seymour W., Jr.
Kaufman, Gary
Kenney, John J.
Kiernan, Peter J.
Klugman, Scott Brian
Kobak, James B., Jr.
LaBarbera, Anne Louise
* Lau-Kee, Glenn
†* Leber, Bernice K.
Lindenauer, Susan B.
Lustbader, Brian G.
MacLean, Ian William
Maroney, Thomas J.
Mazur, Terri A.
McElwreath, Suzanne
McNamara, Michael J.
†* Miller, Michael
Minkoff, Ronald C.
Minkowitz, Martin
Morrissey, Mary Beth Quaranta
Newman, Charles M.
Nolfo, Matthew J.
O'Connor, James P.
Parker, Jessica D.
Paul, Deborah L.
Pitegoff, Thomas M.
* Pruzansky, Joshua M.
Quaye, Rossalyn K.
Radding, Rory J.
Rangachari, Rekha
Ravala, M. Salman
Riano, Christopher R.
Rosato, Joseph S.
Russell, William T., Jr.
Safer, Jay G.
Scott, Kathleen A.
Sen, Diana S
Shafiqullah, Hasan
Shapiro, Jay
† Shishov, Natasha
Silkenat, James R.
Silverman, Robin E.
Slavit, Ira S.
Smith, Asha Saran
Sonberg, Hon. Michael R.
Stephenson, Yamicha
Stoeckmann, Laurie
Swanson, Richard P.
Treff, Leslie C.
van der Meulen, Robin A.
Warner, S. Andre
Watanabe, Tsugumichi
Wesson, Vivian D.
†* Younger, Stephen P.
Zweig, Kenneth Joseph

Second District

Bonina, Andrea E.
Chambers, Hon. Cheryl E.
Fallek, Andrew M.
Gayle, Armena D.
Kamins, Hon. Barry
Klass, Richard A.
Lugo, Betty
Napoletano, Domenick
Quiñones, Hon. Joanne D.
Richman, Steven H.
Richter, Aimee L.
Rosenthal, Elisa Strassler
Scheinkman, Hon. Alan D.
Schram, Luke Christopher
Stong, Hon. Elizabeth S.
Vaughn, Anthony, Jr.
Wan, Hon. Lillian
Waterman, Kathleen C.
Yeung-Ha, Pauline

Third District

Bauman, Harold
Burke, Jane Bello
Donovan, Hon. Ryan T.
Gerbini, Jean F.
Gold, Sarah E.
†* Greenberg, Henry M.
Griesemer, Matthew J.
Hartman, Hon. Denise A.
Kean, Elena DeFio
Kehoe, Peter R.
Kelly, Matthew J.
Kretser, Hon. Rachel
Matos, Maria
McDermott, Michael Philip
†* Miranda, David P.
Montagnino, Nancy K.
Ryba, Hon.Christina L.
Schofield, Robert T., IV
Sciocchetti, Nancy
Silverman, Lorraine R.
Woodley, Mishka
* Yanas, John J.

Fourth District

Betz, Edward Allen
Breding, Alice M.
Clouthier, Nicole L.
Coreno, M. Elizabeth
Gilmartin, Margaret E.
Harwick, John F.
Loyola, Hon. Guido A.
Meyer, Jeffrey R.
Nielson, Kathleen A.
Sharkey, Lauren E.
Simon, Nicole M.
Sise, Hon. Joseph M.
Stanclift, Tucker C.
Teff, Justin S.

Fifth District

Bray, Christopher R.
Doerr, Donald C.
Engel, Paula Mallory
Fellows, Jonathan B.
Fogel, Danielle Mikalajunas
* Getnick, Michael E.
Gilbert, Hon. Gregory R.
Hobika, Joseph H., Jr.
LaRose, Stuart J.
Lynn, Martin Anthony
Radick, Courtney S.
* Richardson, M. Catherine
Spring, Laura Lee
Westlake, Jean Marie

Sixth District

Adigwe, Andria
Barreiro, Alyssa M.
†* Grant Madigan, Kathryn
Lewis, Richard C.
Miller, Rachel Ellen

Seventh District

Bascoe, Duwaine Terrence
Brown, T. Andrew
* Buzard, A. Vincent
Galvan, Jennifer L.
Jackson, LaMarr J.
Kammholz, Bradley P.
Kelley, Stephen M.
Kendall, Amy K.
* Moore, James C.
Moretti, Mark J.
Nussbaum, Carolyn G.
* Palermo, Anthony Robert
Ryan, Kevin F.
* Schraver, David M.
Schwartz-Wallace, Amy E.
* Vigdor, Justin L.

Eighth District

Bond, Jill
* Doyle, Vincent E., III
Effman, Norman P.
* Freedman, Maryann Saccomando
†* Gerstman, Sharon Stern
Kimura, Jennifer M.
McGrath, Patricia M
Meyer, Harry G.
Mohun, Hon. Michael M.
Nowotarski, Leah Rene
O'Connell, Bridget Maureen
Redeye, Lee M.
Russ, Hugh M., III
Sweet, Kathleen Marie
Washington, Sarah M.

Ninth District

Battistoni, Jeffrey S.
Beltran, Karen T.
Caceres, Hernan
Cohen, Mitchell Y.
Cohen, Brian S.
De Jesus-Rosenwasser, Darlene
Degnan, Clare J.
Enea, Anthony J.
Fox, Prof. Michael L.
†* Gutekunst, Claire P.
Jamieson, Hon. Linda S.
Lara-Garduno, Nelida
† Levin Wallach, Sherry
Milone, Lydia A.
Mukerji, Deepankar
Muller, Arthur J., III
Palermo, Christopher C.
Reed, Michael Hayden
Seiden, Hon. Adam
†* Standard, Kenneth G.
Starkman, Mark T.
Tarson, Derek
Triebwasser, Hon. Jonah
Ward, Denise P.
Weis, Robert A.

Tenth District

Berlin, Sharon N.
Bladykas, Lois
Bracken, John P.
Bunshaft, Jess A.
England, Donna
Good, Douglas J.
Gross, John H.
Islam, Rezwanul
Joseph, James P.
†* Karson, Scott M.
Kretzing, Laurel R.
Leo, Hon. John J.
Leventhal, Steven G.
* Levin, A. Thomas
Levy, Peter H.
Lisi, Gregory Scot
Markowitz, Michael A.
Mathews, Alyson
Messina, Vincent J., Jr.
Mulry, Kevin P.
Penzer, Eric W.
Purcell, A. Craig
* Rice, Thomas O.
Robinson, Hon. Derrick J.
Tambasco, Daniel John
Wicks, Hon. James M.

Eleventh District

Abneri, Michael D.
Alomar, Hon. Karina E.
Cohen, David Louis
Dubowski, Kristen J.
First, Marie-Eleana
Jimenez, Hon. Sergio
Katz, Joshua Reuven
Middleton, Tyear
Samuels, Violet E.
Taylor, Zenith T.
Welden, Clifford M., Sr.
Wimpfheimer, Steven

Twelfth District

Braverman, Samuel M.
Hill, Renee Corley
Marinaccio, Michael A.
Millon, Steven E.
Porzio, Madison
Santiago, Mirna M.

Thirteenth District

Cohen, Orin J.
Crawford, Allyn J.
Marotta, Daniel C.
Martin, Edwina Frances
McGinn, Sheila T.
Miller, Claire C.

Out of State

Bahn, Josephine M.
Choi, Hyun Suk
Filabi, Azish Eskandar
Gilbreath Sowell, Karen
Grady, Colleen M.
Heath, Hon. Helena
Houth, Julie T.
Reed, Prof. LaVonda Nichelle
Wolff, Brandon Lee

† Delegate to American Bar Association House of Delegates * Past President

NYSBA CLE

All Access Pass

Maximize Your Time and Earn CLE Credits with On-Demand Learning

Access hundreds of programs online and satisfy your MCLE requirement for one low price.

> Gain access to all CLE Online video programs and course materials for one year

> New programs added each month

> Monthly billing option

$495 for NYSBA Members

For more information visit **NYSBA.ORG/ALLACCESSPASS**

Online only. Does not include live programs, CD or DVD products.

All Access Pass requires member login and cannot be transferred. Annual subscription required.

Periodicals

ADDRESS CHANGE – Send To:
Member Resource Center
New York State Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mrc@nysba.org